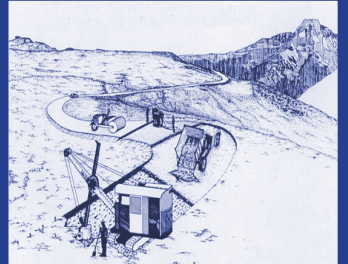


The Contact Committee  
of the Supreme Audit Institutions of the European Union

# PUBLIC PROCUREMENT AUDIT





# **PUBLIC PROCUREMENT AUDIT**

**Lisboa  
2010**

Documents prepared by:

- EU Contact Committee Public Procurement Working Group
- EU Contact Committee Public Procurement Updating Group  
(SAIs of *Belgium, Cyprus, Czech Republic, Denmark, European Court of Auditors, Finland, Germany, Hungary, Ireland, Luxembourg, Portugal, Slovenia and United Kingdom*)

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# Beginning ...

## ***Accountability is condition of trust***

*Tribunal de Contas*, member of both the Contact Committee “Public Procurement Working Group” and “Public Procurement Updating Group”, has a great honour to edit this booklet named as “*Public Procurement Audit*”, prepared as a result of the activity of those Working Groups.

For *Tribunal de Contas*, auditing public procurement is a key issue, due to its relevance within public spending and to its importance to the sound functioning of the economic market. As in other areas, auditing public procurement enforces accountability for such a relevant public activity, which is essential for the citizens’ confidence in the best use of public funds and in the rule of law.

We are sure that the documents included in this book, as they are useful tools for auditors that need to look into public procurement processes and issues, as well as helpful analysis for researchers, add considerable value to the audit capabilities and to the procurement activities.

The modernization of thought and methods of audit are enhanced by the advances that are possible over this work. Its potentialities are clearly evidenced in the high quality of the presented guidelines.

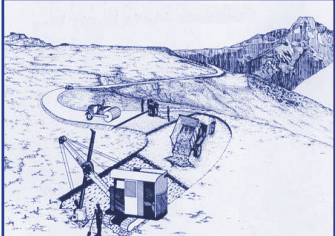
Guilherme d’Oliveira Martins

President of the *Tribunal de Contas* of Portugal





# Foreword





## FOREWORD

Public procurement accounts for a significant proportion of EU expenditure. In 2008, the 27 EU Member States spent around €2155bn, or 17,2% of GDP, on public procurement (works, goods and services)<sup>1</sup>.

The Public Procurement Directives and the principles derived from the EC Treaty, namely the principle of free movement of goods and services, as well as the principle of non-discrimination, are intended to ensure that contracts are awarded in an open, fair and transparent manner, allowing domestic and non-domestic firms to compete for business on an equal basis, with the intention of improving the quality and/or lowering the price of purchases made by Awarding Authorities.

In addition, in a market of this size it is clear that if the laws governing public procurement are not applied correctly, thereby leading to some contracts being awarded to what is not the most economically advantageous or lowest bid, the financial consequences alone can be significant.

In view of this reality, the Contact Committee of the Supreme Audit Institutions (SAI) of the European Union set up, in 2004, a Public Procurement Working Group, on the Irish SAI's initiative.

Actually, SAIs audit the use of these public resources and, depending on mandates, may also promote sound management principles and the attainment of value. The auditor from a SAI may examine the procurement function as part of an audit of the accounts of a specific public authority. Alternatively he/she may be interested in examining specific areas or procedures and in considering efficiency, competition, regularity, fitness for purpose or value added, fraud and corruption. Some SAIs may strive to recommend good practice while others may concentrate on matters of compliance and the action taken in response to identified irregularities.

Under the dynamic leadership of Mr. John Purcell, former Comptroller and Auditor General of Ireland, the Working Group drew up four documents meant to help auditors in the public procurement related audits.

<sup>1</sup> Source: European Commission, *Public Procurement Indicators 2008*, 27 April 2010



The Contact Committee approved these documents and decided in 2008 to set up a Public Procurement Updating Group that would be responsible for updating and further analyzing them:

- A **Guideline for Auditors**, based on the EU Public Sector Procurement Directive 2004/18/EC and including summaries of the most important judgments of the European Court of Justice;
- A **Procurement Performance Model**, including key questions developed as reference pointers for auditors evaluating the performance of the procurement function in public sector bodies;
- **Checklists for Financial and Compliance Audit of Public Procurement**, to be used when auditing public procurement processes. The checklist is relevant and applicable to auditors operating within different frameworks and with different objectives, requirements and procedures and includes fraud and corruption risks;
- **Summaries of audit reports published by EU SAIs** to be included and structured in a database on public procurement.

These documents are now being presented together in this booklet, which is meant to be a simple, user-friendly and efficient tool.

Philippe Roland

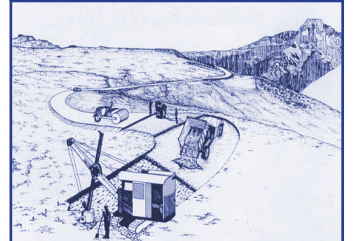
Senior President of SAI of Belgium  
Co-Chair

Igor Šoltes

President of the SAI of Slovenia  
Co-Chair



# Principles of Public Procurement





# PRINCIPLES OF PUBLIC PROCUREMENT

## 1. BASIC PRINCIPLES OF PUBLIC PROCUREMENT

Knowledge of basic principles is very important because, due to diversity of living situations, legislation cannot establish norms for each circumstance.

Also in public procurement procedures, it is necessary to understand legal regulations through certain principles, guiding the contracting authority, in its decision-making, and the tenderer, in the assessment of its rights.

In this area, one must take into consideration both principles having become common value criteria of our civilization and covering the whole legal system and public procurement specific principles.

Public procurement system setup, development and implementation must be based on the principles of free movement of goods, freedom of establishment and freedom to provide services, all deriving from the Treaty establishing the European Community, and also on the principles of economy, efficiency and effectiveness, of ensuring competition among tenderers, of transparency, of equal treatment of tenderers and of proportionality.

The basic principles are specified in Article 2 of Directive 2004/18/EC, as follows:

- Principle of equal treatment,
- Non-discrimination and
- Transparency.

The Treaty establishing the European Economic Community (hereinafter referred to as EEC Treaty) provides the basic framework for European public procurement legal regula-



tions. This act was primarily aimed at establishing a relevant common internal market of Member States by prohibiting any national discrimination and any restriction in the selection of products and services, including the free movement of goods exclusive of all customs duties, as well as prohibiting quantitative limits (quotas) and measures having equivalent effect over customs duties and quotas among Member States.

The objective of the EEC Treaty would be best attained also by prohibiting restrictions to the free movement of labour force and services, capital, salaries and self-employment, as well as by the freedom of choice of establishment of enterprises in Member States.

The attainment of the Treaty objective is to include the development of European Community significant policies, notably in the areas of competition law, state aid and agriculture.

The EEC Treaty does not specifically mention public procurement, except in the context of funding Community contracts in overseas countries and when in relation to industrial policy.

Nevertheless, provisions might be found in the EEC Treaty constituting a basis for public procurement system establishing. These are principally provisions referring to the free movement of goods (Article 28), the freedom of establishment (Article 43), and the freedom to provide services (Article 49) (Arrowsmith 2005: 182). Other provisions are equally important relating to the prohibition of discrimination (Article 12) and to the issue of acquired undertaking (Articles 81, 86, and 87).

The regime of free movement of goods and services is the most important for the area of public procurement. Treaty establishing the European Community (hereinafter referred to as EC Treaty) contains the basic objective of the public procurement acquis, meaning the opening of the public procurement market among Member States and allowing tenderers to participate in public contract awarding procedures beyond the frontiers of individual Member States.





Since it would not be possible for Member States, nearly on the basis of the EC Treaty, to establish more specific public procurement rules, public procurement directives have been adopted as a secondary legal source.

Understanding basic principles and establishing thereof to a legislation system is even more significant in view of the fact that, though the implementation of the directives was not effective everywhere, the principles as such create a single core for interpreting and attaining objectives accompanying the public procurement system through founding contracts and relevant directives.

The principles have an important role to play, both in directing the legislator when adopting the content of legal norms and in the understanding of legal provisions, particularly in cases of imprecise determination thereof. Primarily proper understanding and interpretation of certain principles facilitates the interpretation of legal norms in terms of content, context, and purpose. Legal principles connect legal norms to a single whole providing such norms with the required content, particularly in cases where the flamboyance and diversity of actual circumstances cannot always be covered by a legal norm. A legal rule needs to be understood by means of a specific principle constituting both the direction and the purpose of drafting a particular legal norm.

## 2. CONFLICT OF PRINCIPLES IN PRACTICE THROUGH VALUES, NORMS AND RELATIONS

Proper understanding of public procurement principles is important for contracting authorities also in terms of awareness on the limitation of rights while using public assets for public procurement purposes. This use must not be directed towards the attaining of personal benefit or of the benefit of specific groups, rather to the meeting of the public interest «in largo sensu»...The importance of principles also reflects itself in their restrictive state function within its regulatory attributes.

Interesting questions occurring with the presentation of fundamental principles are whether these principles are mutually equal in rank or whether they are placed in a subordinate-superior order, whether they are mutually exclusive or complementary, and whether they support public procurement objectives to a same direction.

So far, the relation between the principle of formality and the principle of economy (often opposed to each other) has shown itself to be a problematic one.

Contracting authorities experience this conflict in cases when, due to formal reasons, an offer must be rejected – which is not regular due to a missing document that is actually non-essential for good performance of the work but has been demanded by the contracting authority in the documentation – although that particular offer is most appropriate according to tender documentation criteria. Such an offer must be rejected in order to abide by the formality principle in terms of the practice of control institutions, though a decision in favour of this offer would be in accordance with the principle of economy.

Then where is the boundary in the weighting between significance and relation when these two principles are racing? Is it even possible to place them within a system of values which would, in a relatively objective manner, establish in advance boundaries and circumstances under which one of the principles becomes more appropriate than the other? Or should the formality principle be simply placed above the principle of economy not taking into account any economic implications?

It would be ideal if we could offer an answer. Yet, unfortunately, it cannot be given till the time wider consensus is reached among various institutions on the importance of a specific principle in relation to other principles.

While solving this problem, we could consider as an initial point the case law of the Constitutional Court of the Republic of Slovenia in the process of its evaluation of



proportionality, when significance is weighted against the intervention with a specific right in the case of a right tending to protect itself against such intervention, and when it judges there has been more severe intervention proportionate to the higher level of such right being affected. If the Constitutional Court finds that the importance of the right which is to be protected by intervention prevails over the importance of the intervention to the right in question, the intervention will undergo this aspect of the proportionality test.

A certain form of a proportionality test could be established also in the case of public procurement, when an attempt is made to protect a principle by violating another one. This may occur in cases where, for example, for the purpose of protection of the principles of economy, efficiency and effectiveness, the formality principle is violated under assumptions determined in advance, on the basis of which the proportionality test could be examined.

A certain right (in our theoretical case, the principle of formality) may be limited only in cases where it is necessary for the purpose of protection of other rights (in our theoretical case, protection of the principle of economy), where it is necessary to respect the constitutional principle of proportionality, this meaning that it is obligatory to fulfil three conditions for admissibility of those limitations or interventions: urgency, adequacy and proportionality in the narrow sense.

The intervention to the constitutional right is allowed only in cases where such intervention is necessary (inevitable) for the protection of other human rights, which means that a legislative objective cannot be achieved with one more lenient intervention in the constitutional right or without it. The intervention must be appropriate for achievement of a desired, constitutionally allowed objective (for example, protection of the rights of others or of public interest, where the protection of the public interest represents a constitutionally allowed objective.). The intervention should not be excessive, this meaning that only the mildest of all possible interventions is allowed

whereby a constitutionally allowed and wanted objective can be achieved, as well as protection of equally important rights of others. Within the frames of proportionality, the importance of the intervention should be also assessed compared with the importance of the right which is to be protected by the intervention .

Of course, we do not make direct equation between public procurement and constitutional rights. Some of them may even be derived from the use of public procurement or are violated for the purpose of misuse or limitation through legal or executive acts, or by decisions of certain institutions or authorities. In spite of this, mentioned conditions allowing interventions to constitutional rights could, in a reasonable adjustment, create assumptions and basis for assessment of the admissibility of the limitation and exclusion of one fundamental principle of public procurement for the purpose of implementation of another principle.

Not only necessity, but also adequacy and proportionality may be considered input elements in the test of proportionality in the area of public procurement, in which case we would also have to assess the nuisance of the implications of violation of one of the principles in view of the benefit and objectives which are to be achieved through the implementation of another principle and which must be based on the law.

In this way, determined formal insufficiency or violation would not necessarily mean the exclusion of a tenderer from a procedure, in case such insufficiency or violation would not have any negative or adverse implications on other principles of public procurement (the principles of equal treatment of tenderers, non-discrimination etc.).

This disregard would then enable the selection of an offer that would mean implementation of the principle of economy for the purpose of economically most advantageous conditions, appropriate relationship between investments and obtained value. The disregard of the principle of formality on behalf of the principle of economy in this case would also be necessary, appropriate, and proportional.



The above discussed could represent a consideration regarding the formulation of the proportionality test in the area of public procurement, which would represent an important and necessary step ahead in view of recent practice, both for contracting authorities and institutions monitoring regularity and deciding on violations in public procurement procedures, as well as on violations of fundamental principles.

One of the more difficult tasks of legal regulation and practice is to find an appropriate ratio between fundamental principles of public procurement.

We can say that no principle can be excluded, but no principle can also be definitely implemented.

Igor Šoltes

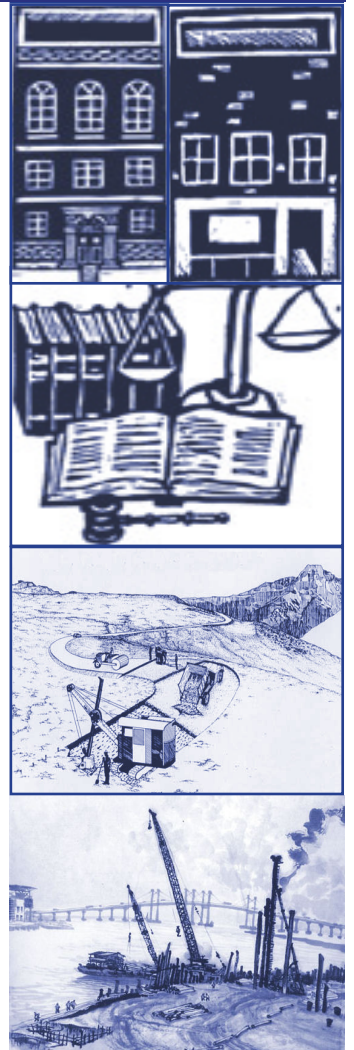
President of the SAI of Slovenia

Co-Chair





# Guideline for Auditors





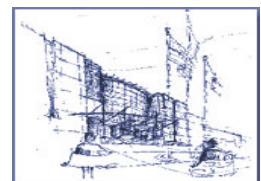


# EU PUBLIC SECTOR PROCUREMENT DIRECTIVE 2004/18/EC - GUIDELINE FOR AUDITORS

## Disclaimer

This guideline – which is intended to serve general information purposes only – has been compiled with the greatest care. Under no circumstances will liability be accepted for damages of whatever nature, in any way resulting from the use of this guideline or resulting from or related to the use of information presented in or made available through this guideline.

The user is recommended to check periodically the websites mentioned in Appendix IX and of course to use the text of the most recent version of the Public Sector Directive 2004/18/EC.







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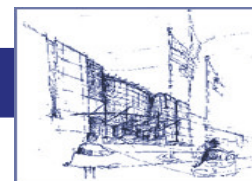
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<sup>1</sup> The complete appendices can be found in the CD-ROM which is annexed at the back of the booklet.



### 1. Introduction

The EC-Treaty provides for free movement and non-discrimination on the grounds of nationality in the provision of goods and services. The Treaty expresses these provisions as basic principles. Procurement Directives adopted by the EU set out in law what Member States must do in exercising the public procurement function to give effect to the principles of the Treaty and to realise the benefits of the Internal Market.

Public procurement accounts for a significant proportion of EU expenditure. In 2008, the 27 EU Member States spent around €2155bn, or 17,2% of GDP, on public procurement (works, goods and services)<sup>2</sup>. The Public Procurement Directives and the principles derived from the EC Treaty are intended to ensure that contracts are awarded in an open, fair and transparent manner, allowing domestic and non-domestic firms to compete for business on an equal basis, with the intention of improving the quality and/or lowering the price of purchases made by Awarding Authorities. In addition, in a market of this size it is clear that if the laws governing public procurement are not always being applied correctly, leading to some contracts being awarded to what is not the most economically advantageous or lowest bid, the financial consequences alone can be significant.

It is therefore very important for the Supreme Audit Institutions of the Member States of the European Union to audit (important) public procurement contracts.

#### *Revision of Directives*

A revision of the EU public procurement Directives was completed in 2004. Three former public sector Directives for works, supplies and services have been consolidated in one new text: Directive 2004/18/EC<sup>3</sup>, covering procurement procedures of public sector bodies. Also new is Directive 2004/17/EC, covering procurement procedures of entities operating

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<sup>2</sup> Source: European Commission, *Public Procurement Indicators 2008*, 27 April 2010.

<sup>3</sup> The most recent (consolidated) version of this directive can be found at: <http://eur-lex.europa.eu>

in the utilities sector<sup>4</sup>. The Directives have been adapted to modern market conditions by providing for measures such as the use of electronic means of procurement and tendering (e-procurement)<sup>5</sup>, providing for framework agreements and for more flexible procedures for awarding complex contracts, such as public private partnership projects (PPP's), in the public sector.

This guideline summarises the principal features and provisions of the EU public sector procurement Directive 2004/18/EC.<sup>6</sup> To aid comprehension, the user is invited to have regard to the additional information provided in the appendices.<sup>7</sup>

It is very important that the public procurement function is discharged honestly, fairly and in a manner that secures best value for public money. Contracting authorities must strive towards cost effectiveness while upholding high standards of probity and integrity.

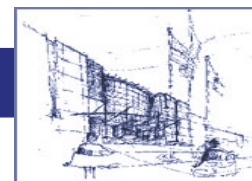
Procurement practices are subject to audit and scrutiny.

## 2. Scope of Directive 2004/18/EC

The Directive is applicable to many but not all public contracts.

Firstly, the contract must be awarded by a *contracting authority*.

- 
- 4 The utilities Directive 2004/17/EC covers entities operating in the water, energy, transport and postal services sectors. Private sector entities which operate under special or exclusive rights in the utilities sector are also covered by the utilities Directive. Most features of the Directives are common to both sectors. However, the utilities Directive provides more flexibility in tendering procedures, reflecting the more commercial remit of the entities it covers. For example, higher thresholds apply to supplies and service contracts under the utilities Directive and there is wider scope to negotiate contracts.
  - 5 The 12th consideration of Directive 2004/18/EC states that: "Certain new electronic purchasing techniques are continually being developed. Such techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow. Contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency".
  - 6 This guideline has taken as format the publication of the "*Public Procurement Guidelines – Competitive Process, 2004*" by the Irish Department of Finance.
  - 7 The appendices can be found in the CD-ROM which is annexed at the back of this booklet.



‘Contracting authority’ means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A ‘body governed by public law’ means any body:

- (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) having legal personality; and
- (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

The definition of “bodies governed by public law” is not very clear and has been clarified by several judgments<sup>8</sup> of the European Court of Justice<sup>9</sup>.

Secondly, the estimated value of the contract placed by a public body must have reached the financial thresholds mentioned in the Directive. The thresholds applying from 1 January 2010 to 31 December 2011 are set out in Appendix II.

Regarding the principles that govern the tendering of public contracts that are not or only partially covered by the public procurement directive (e.g. contracts below the thresholds or public service concessions), see section 9.

<sup>8</sup> See the relevant case-law, mentioned in Appendix XII.

<sup>9</sup> Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) are set out in Annex III of the Directive. Member States have to notify the Commission periodically of any changes to their lists of bodies and categories of bodies.

### 3. Obligations imposed by Directive 2004/18/EC

Directive 2004/18/EC imposes obligations on contracting authorities to:

- advertise their requirements in the Official Journal of the European Union (OJEU);
- use procurement procedures that provide open and transparent competition;
- apply clear and objective criteria, notified to all interested parties, in selecting tenderers and awarding contracts;
- use broadly based non-discriminatory technical specifications;
- allow sufficient time for submission of expressions of interest and tenders.

It is a legal requirement that contracts with estimated values above the thresholds<sup>10</sup> set out in the Directive (apart from some defined exceptions) be advertised in the OJEU and awarded in accordance with the provisions of the Directive. Contracting authorities must also ensure that most works contracts and related services contracts, which they subsidise by 50% or more, are awarded in accordance with the provisions of the Directive. Any infringement of the terms of the Directive can give rise to serious legal or financial sanctions.

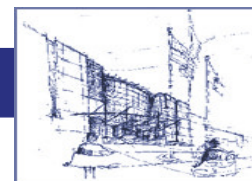
Directive 2004/18/EC covers contracts for:

- Works - buildings and civil engineering contracts
- Supplies - purchasing of goods and supplies
- Services - all of the most commonly procured services, including advertising, property management, cleaning, management consultancy, financial and ICT related services. (See Section 11).

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<sup>10</sup> The current value thresholds (applicable from 1 January 2010 to 31 December 2011) above which contracts are subject to the Directives are set out in Appendix II.





### 4. Criteria for awarding contracts<sup>11</sup>

Contracting authorities may choose to award contracts on the basis of

- the most economically advantageous tender (specifying, in addition to price, various other criteria including running costs, servicing costs, after sales service, technical assistance, technical merit, environmental characteristics) or
- the lowest priced tender

When a contract is being awarded on the most economically advantageous basis, the notice or the tender documents must state all of the criteria being applied in the award process, giving the relative weightings for each criterion.

If it is not technically possible to indicate criteria weightings in advance, they must be listed in descending order of importance. New or amended criteria must not be introduced in the course of the contract award procedure. If significant additional information or material is supplied to a candidate, on request or otherwise, it must be supplied to all candidates.

### 5. Advertising in the Official Journal of the European Union (OJEU)<sup>12</sup>

OJEU Notices must be drawn up in accordance with the standard forms set out in Commission Regulation (EC) No 1564/2005, of 7 September 2005, establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC.

Advertisements in the OJEU may be supplemented by advertisements in the national media to ensure the widest possible competition for the contract. However, national advertisements must not appear before the date of dispatch to the OJEU and must not

<sup>11</sup> Directive 2004/18/EC, article 53.

<sup>12</sup> Directive 2004/18/EC, articles 35 and 36.

contain any information additional to that in the OJEU advertisement. Where supplementary national media advertising is considered necessary, contracting authorities are advised, in the interests of economy, to place abbreviated notices in the media referring interested parties to the OJEU notice for full details.

## 6. Common Procurement Vocabulary<sup>13</sup>

The Common Procurement Vocabulary (CPV) is a classification code developed by the EU Commission to describe thousands of types of works, supplies and services. It is being adopted as the official code for classifying public contracts and is maintained and revised by the Commission as markets evolve and develop. The CPV can be accessed on the <http://simap.europa.eu/> website and the appropriate code should be used for describing the subject of the contract on the standard forms when advertising in the OJEU.<sup>14</sup>

## 7. Prior Information Notices and Buyer Profiles<sup>15</sup>

Contracting authorities with an aggregated procurement requirement in excess of €750,000 for any product area of supplies or category of services or for public works contracts in excess of €4,845,000<sup>16</sup> are encouraged to publish an annual notice called a Prior Information Notice (PIN) in the OJEU. The PIN is normally submitted by the contracting authority at the start of the budgetary year and sets out the categories of products and services likely to be procured during the year.

According to the Directive, contracting authorities are also encouraged to publish 'buyer profiles' on their websites with general information on their procurement requirements and to publicise the existence of these profiles in a PIN.

<sup>13</sup> Directive 2004/18/EC, article 1 (14).

<sup>14</sup> For references, see Appendix XI.

<sup>15</sup> Directive 2004/18/EC, articles 35 and 36.

<sup>16</sup> The attention of the user is brought to the fact that the thresholds are subject to change every two years. The thresholds mentioned in the guideline are valid for the period 2010-2011.



Insertion of a PIN does not commit contracting authorities to purchasing or proceeding with a project if circumstances change. It is intended as an aid to transparency and is for the benefit of suppliers. Publication of a PIN permits a contracting authority to reduce the minimum time for tendering if the PIN, with the necessary amount of information specified, has been dispatched to the OJEU at least 52 days before, and within twelve months of, dispatching the contract notice.<sup>17</sup>

### 8. Thresholds<sup>18</sup>

Any contract placed by a public body over the financial threshold set out in the Directive must be processed and awarded in accordance with the provisions of the Directive, unless it is covered by a clearly defined exception.

The thresholds applying from 1 January 2010 to 31 December 2011 are set out in Appendix II. The thresholds in the Directives are revised by the Commission, under the terms of the Directives, at two-yearly intervals and are published in the OJEU.

It is worth mentioning that according to Article 9(3) of the Directive, the process of segmentation of a public contract is forbidden: “No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive”.

### 9. The Principle of Non Discrimination

#### **Principles governing the tendering of contracts under the European thresholds or excluded altogether from the scope of the Community directives**

While the full procedures of the Directives do not apply to the award of contracts under the thresholds, the European Court has ruled that Treaty principles such as non-discrimination,

<sup>17</sup> Directive 2004/18/EC, articles 35 and 38.

<sup>18</sup> Directive 2004/18/EC, articles 7 and 78.

transparency, freedom of movement and freedom to provide goods and services must be observed. This implies a requirement to advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders.

The European Court of Justice (ECJ) has developed a set of basic standards for the award of public contracts which are derived directly from the rules and principles of the Treaty on the Functioning of the European Union (TFEU), the former European Community Treaty. The principles of equal treatment and non-discrimination on grounds of nationality imply an obligation of transparency which, according to the ECJ case-law<sup>19</sup>, consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed<sup>20</sup>.

These standards apply to the award of services concessions, to contracts below the thresholds<sup>21</sup>, and to contracts for services listed in Annex II B to Directive 2004/18/EC in respect of issues not dealt with by this Directive<sup>22</sup>.

The ECJ has stated explicitly that although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty<sup>23</sup>.

The standards derived from the Treaty apply only to contract awards having a sufficient connection with the functioning of the Internal Market. In this regard, the ECJ considered

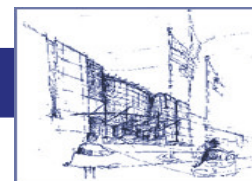
<sup>19</sup> Cases C-324/98, *Telaustria*, [2000] ECR I-10745, paragraph 62, C-231/03, *Coname*, judgment of 21.7.2005, paragraphs 16 to 19 and C-458/03, *Parking Brixen*, judgment of 13.10.2005, paragraph 49.

<sup>20</sup> *Telaustria* case, paragraph 62 and *Parking Brixen* case, paragraph 49.

<sup>21</sup> See Cases C-59/00, *Bent Moustén Vestergaard* [2001] ECR I-9505, paragraph 20 and C-264/03, *Commission v France*, judgment of 20.10.2005, paragraphs 32 and 33.

<sup>22</sup> Case C-234/03, *Contse*, judgment of 27.10.2005, paragraphs 47 to 49. The Public Procurement Directives provide only a limited set of rules for these contracts, see Article 21 of Directive 2004/18/EC and Article 32 of Directive 2004/17/EC.

<sup>23</sup> *Bent Moustén Vestergaard* case, paragraph 20.



that in individual cases, because of special circumstances, such as a very modest economic interest at stake, a contract award would be of no interest to economic operators located in other Member States. In such a case, the effects on the fundamental freedoms are to be regarded as too uncertain and indirect to warrant the application of standards derived from primary Community law<sup>24</sup>.

It is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States. In the view of the Commission, this decision has to be based on an evaluation of the individual circumstances of the case, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location of the place of performance.

If the contracting entity comes to the conclusion that the contract in question is relevant to the Internal Market, it has to award it in conformity with the basic standards derived from Community law.<sup>25</sup>

According to the ECJ<sup>26</sup>, the principles of equal treatment and of non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition.

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<sup>24</sup> Coname case, paragraph 20.

<sup>25</sup> In its Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives of 24 July 2006 (OJ C 179/4 of 1 August 2006) the European Commission has stated that when it becomes aware of a potential violation of the basic standards for the award of public contracts not covered by the Public Procurement Directives, it will assess the Internal Market relevance of the contract in question in the light of the individual circumstances of each case. Infringement proceedings under Article 258 TFEU will be opened only in cases where this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market.

<sup>26</sup> Telaustria case, paragraph 62 and Parking Brixen case, paragraph 49.

The obligation of transparency requires that an undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to express its interest in obtaining that contract<sup>27</sup>.

The European Commission is of the view that the practice of contacting a number of potential tenderers would not be sufficient in this respect, even if the contracting entity includes undertakings from other Member States or attempts to reach all potential suppliers. Such a selective approach cannot exclude discrimination against potential tenderers from other Member States, in particular new entrants to the market. The same applies to all forms of 'passive' publicity where a contracting entity abstains from active advertising but replies to requests for information from applicants who found out by their own means about the intended contract award. A simple reference to media reports, parliamentary or political debates or events such as congresses for information would likewise not constitute adequate advertising. Still according to the European Commission, the only way that the requirements laid down by the ECJ can be met is by publication of a sufficiently accessible advertisement prior to the award of the contract. This advertisement should be published by the contracting entity in order to open the contract award to competition.<sup>28</sup>

## 10. Estimation of Contract Values<sup>29</sup>

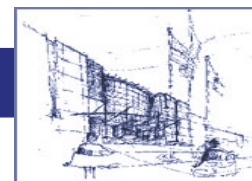
The estimation of contract values for OJEU publication purposes must be realistic and credible and take account of the total amount, including any form of option and any renewals of the contract. Problems are fairly often found in those last cases.

No project or purchase may be sub-divided to prevent it coming within the scope of the Directives. Where a project or purchase involves separate lots the value of all lots must be included in estimating the value of the contract.

<sup>27</sup> Coname case, paragraph 21.

<sup>28</sup> European Commission, *Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*, Section 2.1.1. Regarding the means to ensure the obligation of adequate advertising, see Section 2.1.2 of the Interpretative Communication.

<sup>29</sup> Directive 2004/18/EC, article 9.



If a contract, not advertised in the OJEU, attracts tenders in excess of the EU thresholds, there is a risk that the award could be subject to infringement proceedings.<sup>30</sup>

In such an event, a contracting authority would be required to justify the original estimation.

Another important purpose of the cost estimate is its use as a tool of comparison with tenders received which may assist in the prevention of collusion or monopolistic exploitation. Its importance is amplified in the case of Restricted or Negotiated procedures and Framework Agreements where the possibility of collusion is greater as compared to an open procedure. Determination of the cost estimate must take place before tenders are opened or negotiations commenced. The basis of the cost estimate can vary with the product or service sought and can be based on market prices (e.g. machinery, plant), previous tenders (e.g. medicines), the Internet, (e.g. spare parts) or the Contracting Authority's own data bank (e.g. the construction projects). In the latter case, where tenders are invited on the basis of Bills of Quantities and the contract is to be admeasured or remeasured, it is recommended that the estimate be derived from the individual quantities and unit rates or prices which reflect competitive market conditions. It is good practice to report, together with the cost estimate, any revisions and amendments made because of factors contributing to price changes e.g. labour and fuel cost fluctuations together with any assumptions made and the source of information used to extrapolate the estimate.

## 11. Priority and Non-Priority Services<sup>31</sup>

Under the procurement Directives, services are divided into two categories described as 'priority' and 'non-priority' services (set out in Annex IIA and Annex IIB of the public sec-

<sup>30</sup> The infringement procedure is a procedure conducted before the European Court of Justice by the European Commission. Its purpose is to establish whether a Member State has failed to fulfill an obligation imposed on it by Community law (see articles 258 and 260 TFEU).

<sup>31</sup> Directive 2004/18/EC, article 1 (2) (d).

tor Directive 2004/18/EU). The two categories of services are listed in Appendix IIIA and Appendix IIIB of this guideline.<sup>32</sup>

Only the 'priority' services are subject to the full provisions of the Directive.

While the full procedures of the Directives do not apply to the award of contracts for 'non-priority' services<sup>33</sup>, the European Court has ruled that Treaty principles such as non-discrimination, transparency, freedom of movement and freedom to provide services must be observed. This implies a requirement to advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders.

## 12. Tendering Procedures<sup>34</sup>

The EU Public Sector Directive permits four tendering procedures:

- (i) **Open**<sup>35</sup>. Under this procedure all interested parties may submit tenders. Information on tenderers' capacity and expertise may be sought and only the tenders of those deemed to meet minimum levels of technical and financial capacity and expertise are evaluated. If there are minimum requirements it is important that they be made clear in the notice or the request for tenders (RFT) to avoid unqualified bidders incurring the expense of preparing and submitting tenders.
- (ii) **Restricted**<sup>36</sup>. This is a two-stage process where only those parties who meet minimum requirements in regard to professional or technical capability, experience and expertise and financial capacity to carry out a project are invited to tender.

<sup>32</sup> As *ratio legis* for the distinction, the 19th consideration of the Directive states: "As regards public service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive. In this respect, the mechanism for such monitoring needs to be defined. This mechanism should, at the same time, enable interested parties to have access to the relevant information".

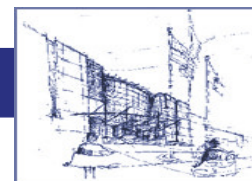
<sup>33</sup> 'Non-priority' services shall be subject solely to Article 23 and Article 35(4) of Directive 2004/18/EC.

<sup>34</sup> Directive 2004/18/EC, articles 28 to 34.

<sup>35</sup> Directive 2004/18/EC, article 28.

<sup>36</sup> Directive 2004/18/EC, article 28.





- As a first step, the requirements of the contracting authority are set out through a contract notice in the OJEU and expressions of interest are invited from potential tenderers. The contract notice may indicate the relevant information to be submitted or the information may be sought via a detailed questionnaire to interested parties.
- The second step involves issuing the complete specifications and tender documents with an invitation to submit tenders only to those who possess the requisite level of professional, technical and financial expertise and capacity. It is important to note that, as a basis for pre-qualifying candidates, only the criteria relating to personal situation, financial capacity, technical capacity, relevant experience, expertise and competency of candidates set out in the Directive<sup>37</sup> are permissible. The European Court of Justice and the EU Commission have ruled clearly on this.

Contracting authorities may opt to shortlist qualified candidates if this intention is indicated in the contract notice and the number or range of candidates indicated. Shortlisting of candidates who meet the minimum qualification criteria must be carried out by non-discriminatory and transparent rules and criteria made known to candidates. The Directive requires that a number sufficient to ensure adequate competition is invited to submit bids and indicate a minimum of five (provided there is at least this number who meet the qualification criteria) and up to a total of 20.

- (iii) **Competitive Dialogue**<sup>38</sup>. This is a new procedure designed to provide more flexibility in the tendering process for more complex contracts, for example public private partnerships (PPP's). Contracting authorities must advertise their requirements and enter dialogue with interested parties, (pre-qualified on the same basis as for restricted procedure). Through the process of dialogue with a range of candidates, a contracting authority may identify arrangements or solutions which meet its requirements. Provided its intention is indicated in the contract notice or in descriptive documents supplied to candidates, a contracting authority may provide for the procedure to

<sup>37</sup> Directive 2004/18/EC, articles 45 to 48.

<sup>38</sup> Directive 2004/18/EC, article 29, and see Appendix VIII.

take place in successive stages in order to reduce the number of solutions or proposals being discussed. The reduction must be achieved by reference to the award criteria for the contract.

In conducting the dialogue, contracting authorities must ensure equality of treatment and respect for the intellectual property rights of all candidates. When satisfied about the best means of meeting its requirements, the contracting authority must specify them and invite at least three candidates to submit tenders. The most economically advantageous tender will then be selected. Aspects of tenders may be clarified or fine tuned provided that there is no distortion of competition or discrimination against any tenderer.

(iv) **Negotiated**<sup>39</sup>. This is an exceptional procedure that may be used only in the limited circumstances set out in Articles 30 and 31 of Directive 2004/18/EC. There are two types of negotiated procedure:

(a) Contracting authorities advertise and negotiate the terms of the contract. This process should normally involve the submission of formal tenders by at least three candidates (pre-qualified on the same basis as for the restricted procedure, provided there are at least this number who meet the minimum qualification criteria) with negotiation on final terms in a competitive process. This procedure may be used mainly:

- where an open, restricted or competitive dialogue procedure has not attracted acceptable tenders;
- where the nature of the requirement does not permit overall pricing;
- where it is not possible to specify requirements for a service with sufficient precision to enable tenderers to respond with priced tenders;

(b) Contracting authorities negotiate, without advertising, the terms of the contract directly with one or more parties. This is a departure from the core principles of

<sup>39</sup> Directive 2004/18/EC, articles 28, 30 and 31.



openness, transparency and competition and is a very exceptional procedure. The main instances where this procedure may be used are:

- in cases of extreme urgency;
- when, for technical or artistic reasons or due to the existence of special or exclusive rights, there is only one possible supplier or service provider;
- when an open or restricted procedure has not attracted appropriate tenders (provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially);
- extension of existing contracts and repeat contracts subject to certain conditions<sup>40</sup>;
- for the purchase of supplies on particularly advantageous terms, from either a supplier definitively winding up a business or the receiver or liquidator of a bankruptcy, an arrangement with creditors or similar legal or regulatory procedure.

Contracting authorities should ensure that the precise circumstances justifying negotiation, as set out in the public sector Directive, exist before deciding on the use of this procedure. It should be noted that definitions of 'exceptions' and 'urgency' are strictly interpreted by the Commission and the Courts. Factors giving rise to urgency must be unforeseeable and outside the control of the contracting authority. Where one of these exemptions is invoked, the contracting authority must be able to justify the use of the exemption.<sup>41</sup> Candidates must always be treated fairly and objectively in negotiations.

<sup>40</sup> As a general rule the provisions confine extension of contracts to 50 pct. of the original value of the contract. See Directive 2004/18/EC, article 31 (2, b) concerning supply contracts and article 31 (4, a) concerning public works and service contracts.

<sup>41</sup> See the illustrative case law of the Court of Justice in Appendix XII.

### *Framework Agreements*<sup>42</sup>

The public sector Directive provides for “framework agreements” under which contracting authorities enter into arrangements with suppliers or service providers to supply goods or services under agreed conditions for a period of time, normally not more than four years.

Framework agreements can be with one supplier or service provider, selected following a competitive process, to fulfil orders or supply services over the period of the agreement. Alternatively, they may be with a number of (at least three) pre-qualified suppliers or service providers. In the latter case, a contract may be awarded to one party to the agreement if the terms of the agreement so permit, or a contract may be the subject of a sub-competition between parties to the framework agreement.

Contracting authorities have to follow the rules of procedure referred to in the directive for all phases up to the award of contracts based on the framework agreement. Under framework agreements, some elements of the requirement, for example quantity, price, precise product specification, will generally not be fully established at the start of the agreement. Advertising for framework agreements should set out the precise nature of the proposed procurements to the highest degree possible.

### *Dynamic purchasing systems*<sup>43</sup>

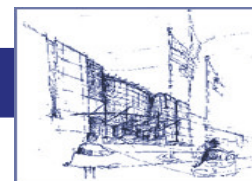
A dynamic purchasing system is defined as a completely electronic process for making commonly used purchases. In order to set up a dynamic purchasing system, contracting authorities have to follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system.

All the tenderers satisfying the qualitative selection criteria and having submitted an indicative tender which complies with the specification and any possible additional

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<sup>42</sup> Directive 2004/18/EC, article 32, and see Appendix VII.

<sup>43</sup> Directive, 2004/18/EC, article 33, and see Appendix X.



documents are admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification.

Contracting authorities invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded. The contract is awarded to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system.

A dynamic purchasing system may not last for more than four years<sup>44</sup>, except in duly justified exceptional cases.

### 13. Time-limits for Replies<sup>45</sup>

Directive 2004/18 defines the time limits for receipt of requests to participate and for receipt of tenders. Minimum time-limits are set down for the different stages of the particular contract award procedure chosen. In all cases, the times specified in days relate to calendar days. When fixing the timescale for submitting expressions of interest/requests to participate or tenders, contracting authorities should take account of the complexity of the contract and allow sufficient time for submitting the necessary information and preparing tenders.

The main **minimum** time-limits, which are reckoned from the date of dispatching the notice to the OJEU, are as follows.

#### Open Procedure

- for receipt of tenders: 52 days
- if a Prior Information Notice (PIN) has been published: as a general rule the minimum time may be reduced to 36 days but in no circumstances less than 22 days.

<sup>44</sup> Directive 2004/18/EC, article 33, paragraph 7.

<sup>45</sup> Directive 2004/18/EC, article 38, and see Appendix V.

## Restricted, Negotiated and Competitive Dialogue Procedures

- for receipt of expressions of interest / requests to participate: 37 days;
- for receipt of tenders under restricted procedures: 40 days from date of issue of invitation to tender;
- if a PIN has been published: as a general rule the minimum time for receipt of tenders under the restricted procedure may be reduced to 36 days but in no circumstances less than 22 days (no reduction in times for receipt of expressions of interest).
- Under a negotiated procedure or in competitive dialogue the time allowed for receipt of tenders may be agreed between the parties involved.

Where genuine urgency renders these time limits impracticable, shorter time-limits may be applied as follows

- for receipt of expressions of interest, not less than 15 days from the date of dispatching the notice and
- for receipt of tenders, not less than 10 days from the date of issue of invitation to tender.

The use of the urgent procedures must be justified and have been caused by unforeseeable events outside the control of the contracting authority. The European Commission and the European Court of Justice interpret 'urgency' very strictly.<sup>46</sup> Delay or inaction on the part of the contracting authority is not sufficient reason for applying exceptional procedures.

Electronic/online transmission: minimum times for responses may be reduced where contract notices are transmitted electronically to the OJEU and all tender documentation is made available electronically in accordance with the provisions of the Directives. The

<sup>46</sup> Illustrative case law of the Court of Justice: Case 194/88 R, Commission v. Italy (Solid urban waste in La Spezia); Case C-24/91, Commission v. Spain (Universidad Complutense of Madrid); Case C-107/92, Commission v. Italy (Avalanche barrier in Colle Isarco/Brennero); Case C-328/92, Commission v. Spain (Pharmaceutical products and specialities); Case C-318/94, Commission v. Germany (Dredging of the lower Ems); Case C-385/02, Commission v. Italy (Overflow basin in Parma); Case C-394/02, Commission v. Greece (Thermal-electricity generation plant at Megalopolis).



reduction can be up to a cumulative 12 days, reflecting the potential for time saving if up-to-date technological methods of communication and transmission are used at the various stages of the process. Conditions for availing of these potential time reductions are set out in Article 38 (5) and (6) of the public sector Directive.

### 14. Issue of Documents<sup>47</sup>

Responses to requests for information, requests for tender documents and other supporting documentation (if not made available electronically) must be issued without delay and in any event within a maximum of six days of the request. Additional information, requested in good time, must be issued at least six days before the latest date for receipt of tenders. In order to avoid giving unfair advantage, additional information supplied to one party in response to a request should be supplied to all interested parties if it could be significant in the context of preparing a tender.

### 15. Receipt and Opening of Tenders

Contracting authorities should ensure that proper procedures are in place for opening tenders to prevent abuse or impropriety at this stage. All tenders should be opened together as soon as possible after the designated latest time and date set for receipt of tenders. Internal procedures should require that opening of tenders takes place in the presence of at least two officials of the contracting authority. The procedure adopted should ensure that, in the case of any dispute, there is a clear and formal independently vouched report of the tenders received. Tenders received after the closing time for receipt of tenders should not be accepted.

<sup>47</sup> Directive 2004/18/EC, articles 39 and 40.

## 16. Clarification of Tenders

Contracting authorities may seek additional information in clarifying submitted tenders. However, alterations to bids after the deadline for submission has passed are not permissible under the open or restricted procedures. In particular, any adjustment to price which could improve the competitive position of a bid is not permitted<sup>48 49</sup>.

## 17. Evaluation of Tenderers and Tenders and Award of Contract<sup>50</sup>

Concerning the verification of the suitability and choice of participants the articles 44 to 52 of directive 2004/18 give clear instructions regarding the qualitative criteria which can be asked to be fulfilled by tenderers (personal, technical, economic and financial).

Evaluation of tenderers and tenders should be carried out by a suitably competent team which may include independent representation. The evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. This is best achieved by the use of a scoring system based on all the relevant and weighted criteria, indicating a comparative assessment of tenders under each criterion. Tenders which do not comply with the requirements specified in the contract notice or the tender documentation should be rejected.

- (i) Where price is the sole criterion, the contract will be awarded to the lowest priced bid complying with the specified requirements.

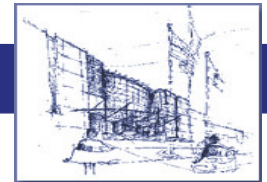
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48 In regard to the open and restricted procedures, the EU Council and Commission have stated that "all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, in particular on prices, shall be ruled out".

49 See the relevant case-law mentioned in Appendix XII and in particular case C-87/94.

50 Directive 2004/18/EC, articles 44 to 52 (qualification and evaluation of tenderers) and 53 to 55 (evaluation of tenders).





- (ii) Where ‘most economically advantageous tender’ is the basis, the contract must be awarded to the tender which best meets the relevant criteria. In addition to price they will include other criteria relevant to the subject of the contract. For example, they may include running costs, servicing costs, level of after sales service, technical assistance, technical merit, environmental characteristics. The criteria, with the relevant weighting, will have been pre-established and made known to the tenderers, in the contract notice and/or the tender documentation (RFT).

The evaluation of tenders is an area where subjective judgement is used and therefore care and diligence should be exercised during the audit of this stage of the process.

Tenders must be evaluated objectively and transparently against the published weighted criteria. Objectivity and transparency is best achieved by the use of a scoring system or marking sheet based on the weighted criteria, indicating a comparative assessment of tenders under each criterion.

The criteria may be subdivided for the purpose of scoring if it assists in the evaluation but this must not involve a departure from the pre-established criteria and weighting.

Under the restricted procedure, care should be taken to ensure that the pre-qualification criteria are not used in the tender evaluation process. Tenderers will be deemed to have met the minimum requirements in regard to their capacity to perform the contract. Tenders should be assessed solely on the basis of how they meet the award criteria related to the actual project.

In open or restricted procedures, the most competitive or advantageous tenderers are frequently asked to make a presentation on their proposals for technical or consultancy projects. These presentations are used as an aid to understanding and for purposes of elaboration and clarification. Any dialogue with tenderers that could be construed as “post tender negotiation” on price, or result in significant changes to criteria or tender

specifications, is to be avoided. Such negotiations, outside the exceptional and clearly defined circumstances where EU rules permit, could contravene the EU procurement Directives.

## 18. Abnormally Low Tenders<sup>51</sup>

A tender which might be regarded as abnormally low may not be rejected without investigation and consideration of the relevant elements that gave rise to a particularly low bid. Such elements might include an innovative technical solution or exceptionally favourable conditions available to the tenderer. The tenderer should be given the opportunity to explain the basis of the tender.

## 19. Disclosure of information: Notifying Tenderers<sup>52</sup> and Contract award notice<sup>53</sup>

Unsuccessful candidates and tenderers for any public contract should be informed of the results of their candidature or a tendering process without delay and must have the opportunity to have a contract award decision rescinded if their rights have been infringed or an award decision is deemed unlawful<sup>54</sup>. The review procedure is organized by directive 89/665/EEC, which is not analyzed in this guideline.

This requires that unsuccessful tenderers for contracts covered by the EU Directives be notified promptly of the outcome of a tendering procedure and that a contract is not formally awarded before an interval, during which an unsuccessful tenderer can seek a review of the decision if s/he feels that the process has been unfair or unlawful, has elapsed. This implies that any notification to the tenderer deemed successful during this interval must

<sup>51</sup> Directive 2004/18/EC, article 55.

<sup>52</sup> Directive 2004/18/EC, article 41.

<sup>53</sup> Directive 2004/18/EC, article 35, § 4.

<sup>54</sup> Case C-81/98, Alcatel.



be provisional and not constitute a contractual arrangement. Tender documentation should include a statement indicating the need for an appropriate interval after the award decision is notified and before a formal contract is put in place.

Proposals in a tendering process are normally submitted on a conventional basis. In order to preserve the integrity of the process and to respect the commercial and competitive positions of tenderers, details of tenders must be kept confidential at least until the evaluation process is concluded. After the award of a contract certain information must be disclosed. Under the public procurement Directives, contracting authorities are required to provide certain information on contracts above the EU thresholds.

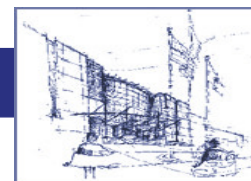
Two particular provisions on disclosure of information in the procurement Directives require that:

- any eliminated candidate or tenderer who requests it must be informed promptly (within 15 days) of the reasons for rejection and of the characteristics and relative advantages of the successful tenderer as well as the name of the successful tenderer.
- contracting authorities publish certain information on contracts awarded (or framework agreements concluded) within 48 days of the award in the OJEU. Particulars, including the type of contract, the procedure and award criteria used, the number of tenders received, the name of the successful tenderer, the value of the contract or the range of tender prices, justification for the negotiated procedure, if used, are published. The necessary information can be submitted online to the OJEU on the standard 'Contract Award Notice'.

However, information may be withheld from publication if release:

- would impede law enforcement or would otherwise be contrary to the public interest,
- would prejudice the legitimate commercial interests of particular undertakings or
- might prejudice fair competition.

The contracting authorities are required to prepare a written report containing fundamental information, as outlined in Article 43 of the public sector procurement Directive 2004/18/EC, on the award procedure adopted. This report, or the main features of it, may be requested by the EU Commission at any time.



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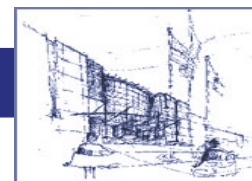
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## Appendix I: Glossary of Terms

*Award Criteria:* criteria, set out in tender documentation, on which tenders will be evaluated and the award of the contract will be based, i.e. relating to how a tenderer addresses and proposes to perform or deliver the object of the contract and at what cost.

*Buyer Profile:* a dedicated online area containing procurement related information. The purpose of a Buyer Profile is to provide details about a contracting authority's procurement practices and intentions, so that potential suppliers will be better informed about the purchaser, and better able to judge whether they want to bid for a particular tender opportunity. A Buyer Profile includes copies of all notices required by the Directive, tender specifications and additional documents, future procurement requirements, the purchaser's procurement process and contact details. The Buyer Profile may also include scheduled purchases, contracts concluded, procedures cancelled and any other useful general information.

*Contracting Authority:* a Government department or office; local or regional authority; any public body, commercial or non commercial; a subsidiary or body established by a public body; any institution or entity funded largely from public funds.

*Public Contract:* a contract for the provision of works, supplies or services to a contracting authority. It includes all procurements, not just those which are undertaken on the basis of a full tendering process and formal signing of a contract.

*Qualification Criteria:* exhaustive criteria (set out in Articles 45 to 48 of Directive 2004/18/EC) to be used in pre-qualifying/pre-selecting candidates who are invited to submit tenders. The criteria relate to a candidate's professional conduct and standing, professional or technical expertise, financial or economic standing, general capacity and competency, i.e. criteria which relate to a candidate's character and capability to perform a particular contract. Proposals in relation to a particular project are not sought and are not a consideration at this stage.

*Restricted Procedure:* a procedure under EU procurement Directives whereby expressions of interest are invited through a notice in the OJEU (and other appropriate media) and only those





who meet certain qualification criteria are issued with the full tender documentation and invited to submit tenders.

*RFT (Request for Tenders)*: all the documentation related to the tendering process. It normally includes a general overview of the tender requirements, a detailed specification of requirements, the format and structure for submission of tenders, how tenders will be examined and the criteria on which they will be evaluated, and some general conditions of tendering. The RFT should normally include a set of conditions for a contract which will be concluded with the successful tenderer.

*Segmentation*: process by which the global value of a public contract is subdivided to prevent its coming within the scope of the Directive.

**Appendix II: Main thresholds (exclusive of VAT) above which advertising of contracts in the Official Journal of the EU is obligatory, applicable from 1 January 2010 to 31 December 2011<sup>55</sup>**

<b>Works</b>	
€ 4,845,000	Threshold applies to Government departments and offices, local and regional authorities and other public bodies.
<b>Supplies and Services</b>	
€ 193,000	Threshold applies to local and regional authorities and public bodies outside the utilities sector.
€ 125,000	Threshold applies to Government departments and offices

**Appendix III: Overview of priority and non-priority services<sup>56</sup>**

**Appendix IV: Guidance for auditors on contracts below threshold for application of the Public Procurement Directives, and on Contracts for Services listed in Annex IIB to Directive 2004/18/EC<sup>57</sup>**

<sup>55</sup> Thresholds are revised every two years and published in the OJEU

<sup>56</sup> The full text of this Appendix is in the attached CD.

<sup>57</sup> *Idem*



**Appendix V: Public Sector Timescales<sup>58</sup>**

**Appendix VI: Steps in conducting a Competitive Process for contracts above EU Thresholds (open, restricted and negotiated procedures) (Diagram)<sup>59</sup>**

**Appendix VII: Framework Agreements and Framework call off stage (Diagram)<sup>60</sup>**

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**Appendix IX: Electronic Auctions (Diagram)<sup>62</sup>**

**Appendix X: Dynamic Purchasing Systems (Diagram)<sup>63</sup>**

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58 *Idem*

59 *Idem*

60 *Idem*

61 *Idem*

62 *Idem*

63 *Idem*

## Appendix XI: Information Sources on Public Procurement

### Guidelines and Directives

EU Directive 2004/18/EC covers the procurement of public sector bodies. Directive 2004/17/EC covers the procurement of entities operating in the utilities sector. These Directives were published in OJ No L 134 of 30 April 2004 and are available on:

<http://eur-lex.europa.eu/en/index.htm>

General information about public procurement can be found at the following website:

[http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm)

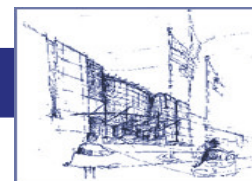
### Official Journal of the EU

Online publication of notices is available on:

<http://simap.eu.int>

### Other relevant websites

- EU Public Procurement website:  
<http://simap.europa.eu>
- General EU website:  
<http://europa.eu>
- WTO site on the 1994 Government Procurement Agreement (GPA):  
[http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)
- Court of Justice website:  
<http://www.curia.europa.eu>



## Appendix XII: Case law of the European Court of Justice concerning public procurement (1982-2005)<sup>64</sup>

### Introduction

The Court of Justice has an important role in the European Union. According to the Treaty, it “shall ensure that in the interpretation and application of this Treaty the law is observed” (Article 19 TEU). The relevant judgments collected in this Appendix are thus an official interpretation of the EU procurement directive.

The analysis of the case law of the Court of Justice has been established – as far as possible – from the official Summaries of the Judgments published in the European Court Reports. Some relevant paragraphs of Judgments can also be found in the text. The Summaries and Judgments are available on the website of the Court of Justice (<http://curia.europa.eu/en/content/juris/index.htm>) or on the portal “Eur-Lex” to European Union law (<http://eur-lex.europa.eu/en/index.htm>).

Reference to the factual context of each case has also be mentioned for a more “concrete” and “realistic” understanding of the rules provided by the EU procurement directive and their interpretation by the Court of Justice.<sup>65</sup>

### 1. Judgment of 10 February 1982, case 76/81, Transporoute

Criteria for qualitative selection – Principle of non-discriminatory treatment – Abnormally low tender

### 2. Judgment of 28 March 1985, case 274/83, Commission/Italy

The most economically advantageous tender

<sup>64</sup> The full text of this Appendix is in the attached CD. There you can find a more comprehensive description of the mentioned ECJ cases.

<sup>65</sup> This introduction relates to the full text of the Appendix, which can be found in the attached CD. In this paper only the key issues of the cases are mentioned.

**3. Judgment of 10 March 1987, case 199/85, Commission/Italy**

Contract award procedures – Exceptional circumstances

**4. Judgment of 09 July 1987, joined cases 27-29/86, CEI and Bellini**

Criteria for qualitative selection – Economic and financial standing of tenderer

**5. Judgment of 20 September 1988, case 31/87, Beentjes**

Contracting authorities – Technical ability and knowledge of tenderers – Publicity requirements – Most economically advantageous tender – Conditions for performance of contracts – Principle of non-discriminatory treatment

**6. Judgment of 22 September 1988, case 45/87, Commission/Ireland**

Technical specifications – Free movement of goods

**7. Judgment of 22 June 1989, case 103/88, Fratelli Costanzo**

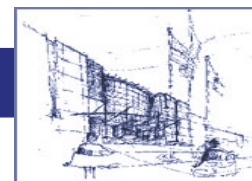
Award of contracts – Abnormally low tenders

**8. Judgment of 5 December 1989, case 3/88, Commission/Italy**

Principle of non-discriminatory treatment – Activities connected with the exercise of official authority – Contracts declared to be secret – Derogations to the common market fundamental freedoms – Application of negotiated procedure without justification

**9. Judgment of 20 March 1990, case C-21/88, Du Pont de Nemours**

Principle of non-discriminatory treatment – Principle of freedom of movement of goods



### **10. Judgment of 18 March 1992, case C-24/91, Commission/Spain**

Contract award procedures – Reasons of extreme urgency

### **11. Judgment of 3 June 1992, case C-360/89, Commission/Italy**

Principle of non-discriminatory treatment – Freedom to provide services – Award of public works contracts – Criteria for qualitative selection

### **12. Judgment of 22 June 1993, case C-243/89, Commission/Denmark**

Principle of non-discriminatory treatment – Common market fundamental freedoms - Contract award procedures

### **13. Judgment of 2 August 1993, case C-107/92, Commission/Italy**

Contract award procedures – (No) reasons of extreme urgency

### **14. Judgment of 14 April 1994, case C-389/92, Ballast Nedam Groep I**

Criteria for qualitative selection – Registration of contractors

### **15. Judgment of 19 April 1994, case C-331/92, Gestión Hotelera Internacional**

Scope of the EU procurement directive – Mixed contract relating both to the performance of works and to the assignment of property

### **16. Judgment of 26 April 1994, case C-272/91, Commission/Italy**

Contract award procedures – Common market fundamental freedoms –

### **17. Judgment of 3 May 1994, case C-328/92, Commission/Spain**

Contract award procedures – Pharmaceutical products and specialities – (No) reasons of extreme urgency – Derogations from common rules – Strict interpretation – Existence of exceptional circumstances

**18. Judgment of 24 January 1995, case C-359/93, Commission /Netherlands**

Contract award procedures – Tender notices

**19. Judgment of 28 March 1996, case C-318/94, Commission/Germany**

Contract award procedures – Application of negotiated procedure without justification – (No) reasons of extreme urgency

**20. Judgment of 25 April 1996, case C-87/94, Commission/Belgium**

Contract award criteria – Principle of equal treatment – Principle of transparency

**21. Judgment of 18 December 1997, case C-5/97, Ballast Nedam Groep II**

Criteria for qualitative selection – Suitability to pursue the professional activity – Economic and financial standing – Technical and/or professional ability – Registration of contractors – Relevant entity

**22. Judgment of 15 January 1998, case C-44/96, Mannesmann**

Contracting authorities - Body governed by public law

**23. Judgment of 17 September 1998, case C-323/96, Commission/Belgium**

Contracting authorities - State

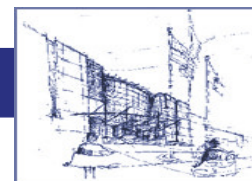
**24. Judgment of 10 November 1998, case C-360/96, Arnhem and Rheden/BFI**

Contracting authorities – Body governed by public law – Needs in the general interest, not having an industrial or commercial character

**25. Judgment of 17 December 1998, case C-353/96, Commission/Ireland**

Contracting authorities – Body governed by public law





### **26. Judgment of 16 September 1999, case C-27/98, Fracasso and Leitschutz**

Award of contracts – Whether it is compulsory to award the contract to the sole tenderer considered suitable

### **27. Judgment of 18 November 1999, case C-107/98, Teckal**

Scope of the directive – Contracting authorities – “In-house”-service or public procurement contract?

### **28. Judgment of 18 November 1999, case C-275/98, Unitron Scandinavia**

Contract award procedures – Contracting authorities

### **29. Judgment of 2 December 1999, case C-176/98, Holst Italia**

Criteria for qualitative selection – Suitability to pursue the professional activity – Economic and financial standing – Technical and/or professional ability

### **30. Judgment of 26 September 2000, case C-225/98, Commission/France**

Contract award procedures – Common rules on advertising – Contract award criteria – Criteria for qualitative selection

### **31. Judgment of 3 October 2000, case C-380/98, University of Cambridge**

Contracting authorities – Bodies governed by public law – Percentage of public financing

### **32. Judgment of 5 October 2000, case C-16/98, Commission/France**

Public works contract – Artificial splitting of a single work – Principle of non-discrimination between tenderers

**33. Judgment of 7 December 2000, case C-94/99, ARGE Gewässerschutz**

Principle of equal treatment – Participation of tenderers receiving subsidies from contracting authorities enabling them to submit tenders at prices lower than those of their competitors

**34. Judgment of 7 December 2000, case C-324/98, Telaustria Verlag**

Scope of the EU procurement directive – Public service concession – Obligation of transparency of the contracting authority

**35. Judgment of 1st February 2001, case C-237/99, Commission/France**

Contracting authorities – Bodies governed by public law

**36. Judgment of 10 May 2001, joined cases C-223 and 260/99, Agora and Excelsior**

Contracting authorities – Body governed by public law – Needs in the general interest, not having an industrial or commercial character

**37. Judgment of 12 July 2001, case C-399/98, Ordine degli Architetti**

Contract award procedures – Common market fundamental freedoms – Scope of the EU procurement directive

**38. Judgment of 18 October 2001, case C-19/00, SIAC Construction**

Award of contracts – Principle of equal treatment – Most economically advantageous tender

**39. Judgment of 27 November 2001, joined cases C-285 and 286/99, Lombardini and Mantovani**

Award of contracts – Abnormally low tenders



### **40. Judgment of 17 September 2002, case C-513/99, Concordia Bus Finland**

Most economically advantageous tender – Protection of the environment – Principle of non-discriminatory treatment

### **41. Judgment of 14 November 2002, case C-411/00, Felix Swoboda**

Contract award procedures – Public service contracts – Qualification of services – Services falling partly within Annex II A and partly within Annex II B – Determination of the applicable regime – Main purpose of the contract – Comparison of the value of the services

### **42. Judgment of 12 December 2002, case C-470/99, Universale-Bau**

Contracting authorities – Body governed by public law – Criteria for qualitative selection

### **43. Judgment of 23 January 2003, case C-57/01, Makedoniko Metro and Michaniki**

Contract award procedures – Group of tenderers – National rules prohibiting a change in the composition of the group after submission of tenders

### **44. Judgment of 27 February 2003, case C-373/00, Adolf Truley**

Contracting authorities – Body governed by public law – Needs in the general interest – Criterion of management supervision by public authorities

### **45. Judgment of 10 April 2003, joined cases C-20 and 28/01, Commission/Germany**

Negotiated procedure without prior publication of a contract notice – Technical or artistic reasons, or reasons connected with the protection of exclusive rights – Environmental protection

**46. Judgment of 15 May 2003, case C-214/00, Commission/Spain**

Contracting authorities – Body governed by public law

**47. Judgment of 22 May 2003, case C-18/01, Korhonen and others**

Contracting authorities – Body governed by public law – Needs in the general interest, not having an industrial or commercial character

**48. Judgment of 19 June 2003, case C-315/01, GAT**

Contract award criteria

**49. Judgment of 16 October 2003, case C-421/01, Traunfellner**

Award of contracts

**50. Judgment of 16 October 2003, case C-283/00, Commission/Spain**

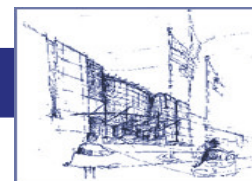
Contracting authorities – Body governed by public law – Needs in the general interest, not having an industrial or commercial character – State commercial company governed by private law

**51. Judgment of 16 October 2003, case C-252/01, Commission/Belgium**

Scope of the EU procurement directive – Execution of services accompanied by special security measures

**52. Judgment of 4 December 2003, case C-448/01, EVN and Wienstrom**

Most economically advantageous tender – “Green” award criterion giving preference to electricity produced from renewable energy sources



### **53. Judgment of 14 September 2004, case C-385/02, Commission/Italy**

Contract award procedure – Derogations from the common rules – Strict interpretation – Existence of exceptional circumstances – Burden of proof

### **54. Judgment of 7 October 2004, case C-247/02, Sintesi**

Right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender

### **55 Judgment of 14 October 2004, case C-340/02, Commission/France**

Principle of equal treatment – Principle of transparency – Application of negotiated procedure without justification – Contract in several phases

### **56. Judgment of 18 November 2004, case C-126/03, Commission/Germany**

Scope of the EU procurement directive – Contract concluded by a contracting authority in relation to an economic activity subject to competition – Contract concluded by a contracting authority in order to be able to submit an offer in a tender procedure

### **57. Judgment of 11 January 2005, case C-26/03, Stadt Halle and RPL Lochau**

Scope of the directive – Contracting authorities – “In-house”-services – Contracting authority having a holding in the capital of a company legally distinct from it

### **58. Judgment of 13 January 2005, case C-84/03, Commission/Spain**

Contracting authorities – Body governed by public law – Public contract – Derogations from the common rules – Strict interpretation – Use of the negotiated procedure in cases not provided for by the directive

### **59. Judgment of 3 March 2005, joined cases C-21 and 34/03, Fabricom**

Principle of non-discrimination between tenderers

**60. Judgment of 21 July 2005, case C-231/03, Coname**

Common market fundamental freedoms – Direct award of a concession for the management of a public gas-distribution service – Principle of transparency

**61. Judgment of 13 October 2005, case C-458/03, Parking Brixen**

Scope of the EU procurement directive - Public service concession – Principle of equal treatment and non-discrimination – Common market fundamental freedoms – Public service concession contracts

**62. Judgment of 20 October 2005, case C-264/03, Commission/France**

Common market fundamental freedoms – Public contracts excluded from the scope of the EU procurement directive – Obligation to respect the fundamental rules of the Treaty – Contract award procedures

**63. Judgment of 10 November 2005, case C-29/04, Commission/Austria**

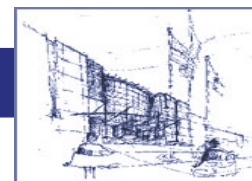
Scope of the directive – Contracting authorities – “In-house”-services – Contracting authority having a holding in the capital of a company legally distinct from it

**64. Judgment of 24 November 2005, case C-331/04, ATI EAC and others**

The economically most advantageous tender – Principles of equal treatment of tenderers and transparency

**65. Judgment of 9 February 2006, joined cases C-226/04 and C-228/04, La Cascina and Zilch**

Public service contracts – Qualitative selection – Payment of social security contributions and taxes



### **66. Judgment of 6 April 2006, Case C-410/04, Associazione Nazionale Autotrasporto Viaggiatori (ANAV)**

Freedom to provide services – Local public transport service – Award with no call for tenders – Award by a public authority to an undertaking of which it owns the share capital – In house?

### **67. Judgment of 11 May 2006, Case C-340/04, Carbotermo and Consorzio Alisei**

Public supply contracts – Award of contract without a call for tenders – Award of the contract to an undertaking in which the contracting authority has a shareholding – In house?

### **68. Judgment of 18 January 2007, Case C-220/05, Jean Auroux and Others**

Public procurement – Definition of “public works contract’ and “work’ – Method of calculation of the value of the contract – Award without call for tenders

### **69. Judgment of 19 April 2007, Case C-295/05, Asociación Nacional de Empresas Forestales (Asemfo)**

National legislation enabling a public undertaking to perform operations on the direct instructions of the public authorities without being subject to the general rules for the award of public procurement contracts – In house

### **70. Judgment of 14 June 2007, Case C-6/05, Medipac-Kazantzidis**

Free movement of goods – Principle of equal treatment and obligation of transparency – Hospital purchase of medical devices bearing the CE marking – Protective measures – Public supply contract

**71. Judgment of 18 July 2007, Case C-382/05, European Commission/Italy**

Public service contracts subject to the EU procurement Directive and not service concessions outside the scope of that directive

**72. Judgment of 13 September 2007, Case C-260/04, European Commission/Italy**

Freedom of establishment and freedom to provide services – Public service concessions – Requirements of publication and transparency – Discrimination on grounds of nationality.

**73. Judgment of 13 November 2007, Case C-507/03, European Commission/Ireland**

Award of public contracts – Common market fundamental freedoms

**74. Judgment of 13 December 2007, Case C-337/06, Bayerischer Rundfunk**

Public service contracts – Contracting authorities – Bodies governed by public law – Condition that the activity of the institution be ‘financed, for the most part, by the State’

**75. Judgment of 18 December 2007, Case C-532/03, European Commission/Ireland**

Public procurement – Common market fundamental freedoms – Emergency ambulance services

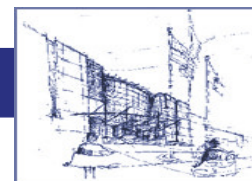
**76. Judgment of 18 December 2007, Case C-357/06, Frigerio Luigi**

Economic operators

**77. Judgment of 24 January 2008, Case C-532/06, Lianakis**

Criteria which may be accepted as ‘criteria for qualitative selection’ or ‘award criteria’ - Principle of equal treatment of economic operators and obligation of transparency – Economically most advantageous tender





### **78. Judgment of 21 February 2008, case C-412/04, European Commission/Italy**

Public works, supply and service contracts – Transparency – Equal treatment – Contracts excluded from the scope of those directives on account of their value

### **79. Judgment of 3 April 2008, case C-346/06, Dirk Rüffert**

Freedom to provide services – Social protection of workers.

### **80. Judgment of 8 April 2008, case C-337/05, European Commission/Italy**

Public supply contracts – Award of public contracts without prior publication of a notice – Absence of competitive tendering – Helicopters

### **81. Judgment of 10 April 2008, case C-393/06, Ing. Aigner**

Body governed by public law – Contracting authority – Contracting entity pursuing activities falling in part within the field of application of Directive 2004/17/EC and in part within that of Directive 2004/18/EC

### **82. Judgment of 15 May 2008, joined cases C-147/06 and C-148/06, SECAP and Santorso**

Community law – Principles – Equal treatment – Contracts with a value below the threshold set by the EU Procurement Directive, which are of certain cross-border interest

### **83. Judgment of 19 June 2008, C-454/06, presstext Nachrichtenagentur**

Procedures for the award of public service contracts – Amendments to the provisions of a public contract during the currency of the contract

**84. Judgment of 17 July 2008, C-347/06, ASM Brescia**

Common market fundamental freedoms – Concession for a public gas-distribution service – Public service concession granted without a competitive tendering procedure – Principles of the protection of legitimate expectations and legal certainty

**85. Judgment of 2 October 2008, case C-157/06, European Commission/Italy**

Procedures for the award of public supply contracts – Light helicopters for the police and the national fire service – Award of public contracts without prior publication of a notice – Derogations from common rules – Restrictive interpretation – Protection of the essential interests of a Member State's security

**86. Judgment of 13 November 2008, case C-324/07, Coditel Brabant**

Public procurement – Tendering procedures – Public service concessions – Concession for the operation of a municipal cable television network – Awarded by a municipality to an inter-municipal cooperative society – Obligation of transparency – Whether the control exercised by the concession-granting authority over the concessionaire is similar to that exercised over its own departments.

**87. Judgment of 16 December 2008, case C-213/07, Michaniki**

Public works contracts – Grounds for excluding participation in a contract

**88. Judgment of 19 May 2009, case C-538/07, Assitur**

Public service contracts – National legislation not allowing companies linked by a relationship of control or significant influence to participate, as competing tenderers, in the same procedure for the award of a public contract

**89. Judgment of 9 June 2009, case C-480/06, European Commission/Germany**

Contracting authorities – No formal European tendering procedure for the award of waste treatment services – Cooperation between local authorities



### **90. Judgment of 11 June 2009, case C-300/07, Hans & Christophorus Oymanns**

Public supply contracts and public service contracts – Bodies governed by public law – Contracting authorities – Invitation to tender

### **91. Judgment of 10 September 2009, case C-573/07, Sea**

Public procurement – Award procedures – Contract relating to a service for the collection, transport and disposal of urban waste – Awarded without any call for tenders – Awarded to a company limited by shares whose capital is wholly owned by public bodies but under whose statutes a private capital holding is possible

### **92. Judgment of 10 September 2009, case C-206/08, Eurawasser**

Procurement procedures of entities operating in the water, energy, transport and postal services sectors – Service concession – Public service for the distribution of drinking water and the treatment of sewage

### **93. Judgment of 15 October 2009, case C-196/08, Acoset**

Award of public contracts – Award of water service to a semi-private company – Competitive procedure – Appointment of the private partner responsible for operating the service

### **94. Judgment of 15 October 2009, case C-138/08, Hochtief and Linde**

Negotiated procedures with publication of a contract notice – Obligation to ensure genuine competition

### **95. Judgment of 12 November 2009, case C-199/07, Commission/Greece**

Contract notice – Qualitative selection and award criteria

**96. Judgment of 10 December 2009, case C-299/08, Commission/France**

Procedures for the award of public contracts

**97. Judgment of 23 December 2009, case C-305/08, CoNISMa**

Public service contracts – Concepts of ‘contractor’, ‘supplier’ and ‘service provider’ – Concept of ‘economic operator’ – Universities and research institutes – Group (‘consorzio’) of universities and public authorities – Where the primary object under the statutes is non-profit-making – Admission to a procedure for the award of a public contract.

**98. Judgment of 23 December 2009, case C-376/08, Serrantoni and Consorzio stabile edili**

Public works contracts – Principle of equal treatment – Groups of undertakings – Prohibition on competing participation in the same tendering procedure by a ‘consorzio stabile’ (‘permanent consortium’) and one of its member companies.

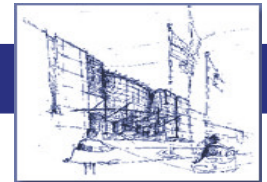
**Appendix XIII: Tender documents. An auditor’s view<sup>66</sup>**

**Appendix XIV: Price and quality coefficients in the evaluation of tenders<sup>67</sup>**

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<sup>66</sup> The full text of this Appendix is in the attached CD.

<sup>67</sup> *Idem*



### **Appendix XV: Directive 2009/81/EC, of 13 July 2009, on the award of works contracts, supply contracts and service contracts in the fields of defence and security**

The new Directive 2009/81/EC on defence and security procurement entered into force on 21 August 2009. The Directive is to become the cornerstone of a truly European Defence Market supporting the development of the European defence-related supplier base.

Up until now, the vast majority of defence and sensitive security procurement contracts have been exempted from the Internal Market rules. One of the reasons for this is that the existing EU procurement rules are considered to be ill-suited for most defence and security-related purchases.

The new Directive should greatly improve this situation by providing tailor-made procurement rules for defence and security contracts.

Member States now have at their disposal Community rules they can apply to complex and sensitive transactions without putting at risk their legitimate security interests.

#### ***More transparency and competition for Europe's defence and security markets***

Before Directive 2009/81/EC, most defence and sensitive security equipment had to be procured on the basis of uncoordinated national rules, which differ greatly in terms of publication, tendering procedures, selection and award criteria, etc. This regulatory patchwork was a major obstacle on the way towards a common European defence equipment market and opened the door to non-compliance with the Internal Market principles.

Directive 2009/81/EC will open up the Internal Market for defence and security products by introducing transparent and competitive procurement rules specifically adapted to the needs of these highly sensitive sectors.

***A tailor-made procurement regime for sensitive contracts***

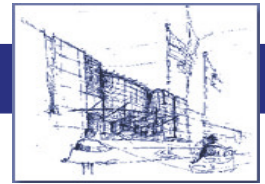
The new rules apply to the procurement of arms, munitions and war material and also to sensitive non-military contracts in areas such as protection against terrorism which often have similar features to defence contracts.

The Directive contains a number of innovations tailored to the specific needs of procurement in defence and security markets:

- Awarding authorities may use the negotiated procedure with prior publication as a standard procedure, which gives them flexibility to fine-tune all details of the contract.
- Candidates may be required to submit specific guarantees ensuring security of information (safeguarding of classified information) and security of supply (timely and reliable contract execution, especially in crisis situations).
- Specific rules on research and development contracts strike a balance between the need to support innovation and the necessary openness of production markets.
- Awarding authorities may oblige contractors to award subcontracts in a competitive manner, opening-up supply chains and creating business opportunities for SME's in the defence and security sector.
- A set of national review procedures will provide effective remedies protecting the rights of businesses taking part in the award procedure.

***Limiting exemptions from the Internal Market rules to the strict minimum***

Member States still have the possibility to use Article 296 EC Treaty to exempt defence and security procurement contracts which are so sensitive that even the new rules cannot satisfy their security needs.



In most cases, however, Member States should be able to use the new Directive without any risk for their security.

### ***Transposition***

Member States have time until 21 August 2011 to transpose Directive 2009/81/EC into their national legislation.

*For more information, see:*

[http://ec.europa.eu/internal\\_market/publicprocurement/dpp\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/dpp_en.htm)







# Procurement Performance Model





The Procurement Performance Model develops key questions as reference pointers for auditors evaluating the performance of the procurement function in public sector bodies.





## PROCUREMENT PERFORMANCE MODEL

### Meta level – assessment of the governments overall procurement strategy

- 1 Do government policies promote and/or safeguard fair competition?
- 2 Does government have an overall procurement strategy and/or policy?
- 3 Are procurement policies and practices in line with (international) good practice standards?
- 4 Is the performance of the procurement function/unit benchmarked with other procurement functions/units in the different stages of the procurement process?
- 5 Are obtained prices/qualities competitive to prices/qualities obtained by other procurement functions/units, comparing obtained or improved value for money?

### Macro level – assessment of the department’s procurement function/unit:

- 6 Are outsourcing and Public Private Partnerships considered as alternatives to in-house work?
- 7 Does the department have a procurement strategy and is it implemented?
- 8 Is the department’s procurement function/unit well organized?
- 9 Is the procurement process well organized?
- 10 Do the employees have the necessary skills and experience to carry out procurements efficiently?
- 11 Are there appropriate controls in place to ensure that procurement complies with the relevant legislation?
- 12 Are there mechanisms in place to evaluate the performance of the department’s suppliers?
- 13 Are risks managed to provide reasonable assurance regarding department procurement-objectives?
- 14 Are there regular reviews and analysis of the performance of the procurement function/unit?

### Micro level – assessment of a single procurement project

- 15 Does the procurement project have a clear goal and does the goal meet the specified needs of the users?
- 16 Is the procurement project efficiently managed?
- 17 Are there appropriate controls in place to ensure that the procurement project complies with relevant legislation?







## Procurement performance model

### META LEVEL - ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

#### I. Do government policies promote and/or safeguard fair competition?

### Why important?

Public procurement can only be successful in a competitive business environment. There are business sectors in which sound competition has to be promoted or needs government attention. Typical government policies within this context may include law and regulations to promote free trade as well as anti corruption policies.

### Questions

- Is free and fair (international) competition promoted by government policies and legislation, in line with EU, trade organisations and other policies?
- Are regulations on taxes, fees, duties, excises, tariffs etc. not impeding (international) competition?
- Do government agencies oversee that rules of competition are adhered to?
- Does government impose sanctions on companies unduly limiting competition?
- Are regulations and protective measures in place to avoid corruption?
- Is government transparent about winning bids and prices?

### Guidance

- Directive 92/50/EEC; Guide to the Community rules on public procurement of services  
([http://europa.eu.int/comm/internal\\_market/publicprocurement/index\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/index_en.htm))
- Office of Fair Trading (OFT) – UK: Guidelines to competition assessment; February 2002  
(<http://www.of.gov.uk/Business/regulations/default.htm>)
- Australian Chamber of Commerce and Industry: National Competition Policy; April 2001, N.974  
([http://www.aph.gov.au/library/intguide/econ/ncp\\_ebrief.htm](http://www.aph.gov.au/library/intguide/econ/ncp_ebrief.htm))
- Council of Europe: Resolution (97)24: On the twenty guiding principles for the fight against corruption  
([http://www.coe.int/T/E/Legal\\_affairs/Legal\\_cooperation/Combating\\_economic\\_crime](http://www.coe.int/T/E/Legal_affairs/Legal_cooperation/Combating_economic_crime))
- United Nations (UN): Convention against corruption 2003  
(<http://www.unodc.org/unodc/en/corruption.html>)
- Transparency International  
(<http://www.transparency.org>)

### META LEVEL - ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

#### 2. Does government have an overall procurement strategy and/or policy?

#### Why important?

Considering the (financial) importance of procurements for government, it may be wise to develop an overall government strategy and/or policy on public procurement. This would facilitate a more unified approach by various government institutions and public entities. This government policy could include performance targets for the various procuring units and ethical guidelines related to public procurements (for example on child labour, the environment etc.).

#### Questions

- Does government have an overall strategy and/or policy on public procurement, providing guidance for procuring entities?
- Does the government policy include:
  - Performance targets on value for money obtained and cost savings?
  - Ethical guidelines for public procurement?
  - Provisions for obtaining overall management information on public procurement?

#### Guidance

- Getting value for money from procurement/How auditors can help? – National Audit Office/Office of Government Commerce (England)
- Government-wide review of procurement; Parliamentary Secretary's Task Force; Canada 2005 (<http://www.pwgsc.gc.ca/prtf/text/presentations/21-23oct04-e.html>)





## Procurement performance model

### META LEVEL - ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

#### 3. Are procurement policies and practises in line with (international) good practise standards?

### Why important?

Multinational and Supranational organisations (for example EU, UN, World Bank etc.) have established standards and good practice guidelines for public procurement. These standards are designed to promote effective procurement, value for money, fair competition, harmonisation and transparency. It is therefore important that government is in compliance with international standards and adopts good practice guidelines.

### Questions

- Is government aware and informed about international procurement standards and good practice?
- Are procurement policies, procedures and organisation evaluated against these standards?
- Does government learn from benchmarking its own practices with international standards?

### Guidance

- Directive 92/50/EEC; Guide to the Community rules on public procurement of services ([http://europa.eu.int/comm/internal\\_market/publicprocurement/index\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/index_en.htm))
- United Nations Commission on International Trade Law (UNCITRAL): Model law on procurement of goods, construction and services to enactment (<http://www.uncitral.org/uncitral/en/index.html>)
- World Bank: Office Memorandum May 23, 2002 – 38874: Revised CPAR (Country Procurement Assessment Reports) procedures ([http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0..page\\_PK:84271~theSitePK:84266,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0..page_PK:84271~theSitePK:84266,00.html))
- SIGMA – paper N.º 30 – December 2000 (114): Public Procurement Review Procedures (<http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN006807.pdf>)
- Council of Europe: Resolution (97)24: On the twenty guiding principles for the fight against corruption ([http://www.coe.int/T/E/Legal\\_affairs/Legal\\_cooperation/Combating\\_economic\\_crime](http://www.coe.int/T/E/Legal_affairs/Legal_cooperation/Combating_economic_crime))
- United Nations (UN): Convention against corruption 2003 (<http://www.unodc.org/unodc/en/corruption.html>)

### META LEVEL - ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

#### 4. Is the performance of the procurement function/unit benchmarked with other procurement functions/units in the different stages of the procurement process?

### Why important?

Departmental agencies and non-departmental public bodies are responsible for determining the goods and services they need and for the way they acquire them. The procurement function/unit covers every aspect of the process of determining the need of goods and services (including works), and buying, delivering and storing them. Benchmarking with other procurement functions/units may highlight options for further improvements.

### Questions

- Is the procurement function/unit compared with other procurement functions/units and what are the results of a comparative analyses including the various stages in competitive procurement, for example:
  - Assessing the need for the goods and services;
  - Specification of requirement;
  - Agreeing list of potential suppliers;
  - Invitation to tender;
  - Evaluation of bids;
  - Selection of supplier;
  - Agreeing form of contract;
  - Formal awarding of contract;
  - Evaluation of contract performance?

### Guidance

- Getting value for money from procurement / How auditors can help? – National Audit Office / Office of Government Commerce (England)



## Procurement performance model

### META LEVEL - ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

5. Are obtained prices/qualities competitive to prices/qualities obtained by other procurement functions/units, comparing obtained or improved value for money?

### Why important?

Procurements should be based on value for money (defined as the optimum combination of whole life costs and fulfilment of customer's requirements) rather than initial purchase price. Benchmarking with other procurement functions/units may highlight options for further improvements.

### Questions

- How do procurement functions/units compare regarding:
  - Value for money obtained, comparing the quality of service and costs.
  - Improving value for money by for example: (a) reducing the cost of purchasing and the time it takes; (b) negotiation; (c) improving project-, contract-, asset- and/or risk management.
- How do the procurement functions/units manage the procurement risks (for example: the risk if the supplier does not deliver on time, to budget and of appropriate quality; the risk of indiscretion, fraud and waste)?
- Which forms of contract strategies are generally used by the procurement functions/units and is the choice to use this specific contract strategy inspired by the need to deliver value for money (most likely compared to other strategies)?
- Do the procurement functions/units work in compliance with proper project management procedures; so that projects are delivered on time, within cost limits, meeting quality standards and with minimum disruption of services?

### Guidance

- Getting value for money from procurement / How auditors can help – National Audit Office / Office of Government Commerce (England)

### MACRO LEVEL - ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION/UNIT

#### 6. Are outsourcing and Public Private Partnerships considered as alternatives to in-house work?

#### Why important?

The use of competition and Public Private Partnership may ensure that the public way of handling tasks are organized appropriately and efficiently, including that there is a division of labour between the public and private sector. Therefore, it is important to consider in details exactly what is produced in-house and what advantageously may be produced externally.

#### Questions

- Are decisions to outsource and being part of public private partnerships closely linked to the delivery of department's core services and functions?
- Are advantages and disadvantages of in-house production, outsourcing and Public Private Partnerships considered?
- Is it tested periodically, whether the public's way of handling tasks is competitive in relation to price and quality?
- Is it on a regular basis examined whether it is possible to enter into public private partnerships with private suppliers?
- Are services/tasks combined in such a way that the market is used where relevant?
- Is it assessed whether well-functioning markets exist for the departments' services/tasks?
- Is it considered whether services/tasks are of a sufficient volume to make it attractive to outsource these services/tasks?
- Does the department focus on procedure costs in connection with tendering or entering into Public Private Partnerships?

#### Guidance

- <http://www.ppp.gov.ie/splash.php> (Ireland)
- <http://ncppp.org/> (USA)
- <http://www.centipedia.com/articles/Outsource> (England)



## Procurement performance model

### MACRO LEVEL - ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION/UNIT

#### 7. Does the department have a procurement strategy and is it implemented?

##### Why important?

A strategic approach to procurement is important because it can assist a department in meeting its policy objectives and to obtain value for money in procurement. A procurement strategy can among other things help:

- Build a common idea of what is more important when procurement decisions are made. (for example the relationship between price, quality and service)
- Optimize procurement in the organization as a whole, by using the collective buying power and reducing internal administrative cost
- Assuring the right competences among procurement staff and the right tools to support an efficient administration, for example e-procurement
- Support the achievement of departmental policy and business objective by making a link to the procurement goals

##### Questions

- Is the relationship between in-house and external work considered in the strategy?
- Does the strategy ensure that needs are met, but not exceeded?
- Does the strategy ensure that the concepts of standardisation and coordination of procurement are used to take advantage of the department's collective buying power?
- Does the strategy discuss the best manner of purchase, considering the types of goods and services needed?
- Does the strategy ensure that the best supplier is chosen considering: price, quality, service, dependable operation, internal operation costs, life time operation costs and codes of ethic?
- Does the strategy include a policy for identifying and training suitable procurement staff?

- Does the strategy ensure that appropriate controls are in place to:
  - Ensure propriety and regularity in delivery?
  - Address risk of fraud and corruption?
  - Monitor behaviour of procurement staff?
- Does the strategy contain incentives to evaluate the performance of the procurement function/unit?
- Is the strategy implemented across the entire organization?

### Guidance

- Improving Procurement, National Audit Office (England) 2004
- Modernizing Procurement, National Audit Office (England) 1999
- Contract Management – Agencies Can Achieve Significant Savings on Purchase Card Buys, United States Government Accountability Office (USA) 2004
- Getting value for money from procurement/How auditors can help – National Audit Office / Office of Government Commerce (England)
- Procurement Excellence – a guide to using the EFQM model in procurement, Office of Government Commerce (England) 1999



### MACRO LEVEL - ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION/UNIT

#### 8. Is the department's procurement function/unit well organized?

##### Why important?

Having procurement organized effectively is a very central area of effort, as the internal way of organising procurement may be a mean for a department to improve effectiveness of procurement. By this mean a department may reduce its costs of handling procurement and invoicing significantly.

##### Questions

- Is there an overall mission for the procurement function/unit and is it determined which tasks the procurement function/unit should carry out?
- Has guidelines been set up for how the procurement function/unit should carry out its procurements?
- Has it been determined which areas of procurement the function/unit should cover?
- Has it been determined which shared services the procurement function/unit should be part of?
- Has it been determined how large a portion of the procurement portfolio that should be managed by the procurement function/unit and how large a portion that should be managed locally?
- Is the procurement function/unit organised the most appropriate way taking into consideration the actual tasks which the department has to carry out?
- Is the performance of the procurement function/unit regularly evaluated?

##### Guidance

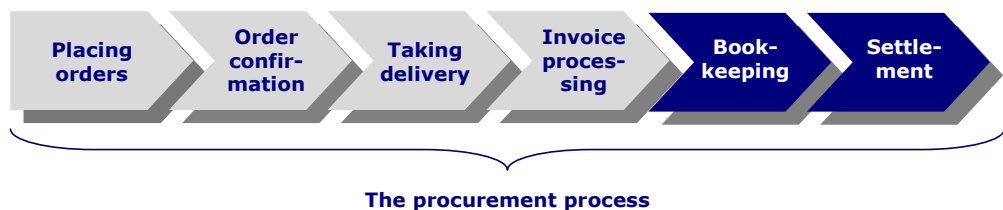
- Modernizing Procurement, National Audit Office (England) 1999
- Improving Procurement, National Audit Office (England) 2004

### MACRO LEVEL - ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION/UNIT

#### 9. Is the procurement process well organized?

#### Why important?

Having the procurement process organized effectively is an important area of effort, as the procurement process may be a mean for a department to reduce transaction costs associated with procurement. The different steps in the procurement process are set out in figure 1.



By having the procurement process organized effectively a department may reduce its costs of placing orders, order confirmation, taking delivery of goods, invoice processing, bookkeeping and settlements.

#### Questions

- Has the department identified and described the different elements in the procurement process?
- Has guidelines been set up for how the procurement process should be conducted?
- Is the procurement process organised the most appropriate way taking into consideration the amount of procurement?
- Is the procurement process fully digitalized?
- Is electronic procurement applied to reduce transaction costs?
- Does the procurement process compile basic procurement information such as how much is bought and spend with individual suppliers?
- Is the efficiency of the procurement process regularly evaluated?





### Guidance

- Improving Procurement, National Audit Office (England) 2004
- Getting value for money from procurement/How auditors can help – National Audit Office/  
/Office of Government Commerce (England)
- Modernizing Procurement, National Audit Office (England) 1999
- Purchasing Professional Services, National Audit Office (England) 2001

### MACRO LEVEL - ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION/UNIT

10. Do the employees have the necessary skills and experience to carry out procurements efficiently?

#### Why important?

Procurement requires a mix of skills ranging from the ability to negotiate prices, interpreting market intelligence and an ability to negotiate terms and conditions, to competencies in electronic procurement and contract management. It is therefore important that the procurement function/unit has professional skills and experience to carry out the procurements efficiently.

#### Questions

- Does procurement staff have recognised professional procurement qualifications or sufficient training?
- Does procurement staff have skills to procure complex or special items (i.e. IT)?
- Does the procurement function/unit understand customer needs, supply markets and suppliers?
- Does the procurement function/unit have the ability to negotiate with customers and suppliers?
- Does the procurement function/unit have the ability to apply public procurement principles and to prepare tender and contract documents?
- Does the procurement function/unit have the ability to apply electronic procurement?
- Does the procurement function/unit have the ability to secure best performance from contractors?

#### Guidance

- Improving Procurement, National Audit Office (England) 2004
- Improving IT procurement, National Audit Office (England) 2004



### MACRO LEVEL - ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION/UNIT

11. Are there appropriate controls in place to ensure that procurement complies with the relevant legislation?

#### Why important?

It is important that appropriate controls are in place to ensure that procurement complies with relevant legislation and other rules. Failure to comply has the effect that optimum procurement is not achieved and that the department runs the risk of legal proceedings.

#### Questions

- Are there internal control systems in place to secure that laws and regulations are observed?
- Are the internal control systems operational?
- Do the internal control systems function appropriate?
- Has management taken the necessary steps to ensure that relevant control systems are always up to date?

#### Guidance

- <http://www.coso.org/>
- Procurement, a statement of good practice, National Audit Office (New Zealand) 2001

### MACRO LEVEL - ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION/UNIT

#### 12. Are there mechanisms in place to evaluate the performance of the department's suppliers?

##### Why important?

The performance of a department's suppliers is vital to an efficient procurement system and the attainment of department policy objectives. It is therefore important that there are mechanisms for evaluating the performance of suppliers. Failure to evaluate the performance of suppliers includes a risk of not identifying problems at an early stage and of failing to follow up on a service level which is unsatisfactory.

##### Questions

- Are there mechanisms for evaluating the department's suppliers' performance in relation to prices, quality, delivery and innovation?
- Do contracts contain regular reviews, targets and quality standards in order to assess suppliers' performance?
- Is there a forum where the department's suppliers' performance is regularly discussed with the suppliers?

##### Guidance

- Government-wide review of procurement, Parliamentary Secretary's Task Force (Canada) 2005
- Improving Procurement, National Audit Office (England) 2004
- Getting value for money from procurement/How auditors can help – National Audit Office/Office of Government Commerce (England)



## Procurement performance model

### MACRO LEVEL - ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION/UNIT

#### 13. Are risks managed to provide reasonable assurance regarding department procurement objectives?

##### Why important?

The systematic application of management policies, procedures, and practices to the tasks of analyzing, evaluating and controlling risk in the procurement area is important to provide reasonable assurance regarding entity procurement objectives. Failure to apply risk management in the procurement area may result in prices that are not competitive, reduced standards of received goods and services and dissatisfied stakeholders.

##### Questions

- Are information gathered to produce knowledge about procured goods and services, prices paid and supplier performance?
- Are risks in the internal environment identified, for example:
  - Inadequate organisation of the procurement function/unit?
  - Dysfunctional culture?
  - Inferior competencies among procurement staff?
  - Ineffective internal communication in the procurement function/unit?
- Are risks in the external environment identified, for example:
  - Budgetary constraints?
  - Competition on procurement staff?
  - Threats to supplier relations?
  - Stakeholder-dissatisfaction?
- Are required quality and service standards set?
- Are behaviour modification applied to change procurement of goods and services if procurement is not functioning properly?
- Is there an effective risk management system continuously monitoring procurement risk?

##### Guidance

- Enterprise Risk Management – Integrated framework, COSO, 2004
- <http://www.bettermanagement.com/library/library>.

### MACRO LEVEL - ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION/UNIT

#### 14. Are there regular reviews and analysis of the performance of the procurement function/unit?

#### Why important?

Regular review of the performance of the procurement function/unit is an important area of effort as it enables the department to identify opportunities to increase value for money and to identify malpractice and procurement fraud. Failure to regularly review the performance will result in increased risk if the procurement function/unit is malfunctioning.

#### Questions

- Does the department have a system for capturing performance data of the procurement function/unit, and does the information include information on:
  - What is bought?
  - The prices paid?
  - Who are the key suppliers?
  - Ways of achieving goods and services?
  - Process cost of the procurement function?
- Does the department evaluate and benchmark the performance of the procurement function/unit against other comparable procurement functions/units?
- Are there systems for recording and monitoring in order to discover malpractice and fraud in the procurement function/unit?

#### Guidance

- Getting value for money from procurement/How auditors can help – National Audit Office / Office of Government Commerce (England)
- Government-wide review of procurement, Parliamentary Secretary's Task Force (Canada) 2005
- Improving Procurement, National Audit Office (England) 2004



### MICRO LEVEL - ASSESSMENT OF A SINGLE PROCUREMENT PROJECT;

15. Does the procurement project have a clear goal and does the goal meet the specified needs of the users?

### Why important?

Having a clear goal may improve value for money and may ensure a link between the purchase on one hand and the achievement of departmental policy and business objectives on the other hand. Carefully prepared procurement goals can help achieve:

- That users needs are met, but not exceeded.
- The best manner of purchase is chosen, considering the type of goods or service needed.
- The procurement project can be evaluated.

### Questions

- Is there a need for the procurement project at all?
- Are the user's needs clearly and invariably defined and has the expected outcome or mission been clearly identified and communicated in measurable terms?
- Has alternatives been considered for the specified procurement project?
- Has an upper limit of cost been fixed?
- Has the expected benefits from realisation of the procurement project been calculated?

### Guidance

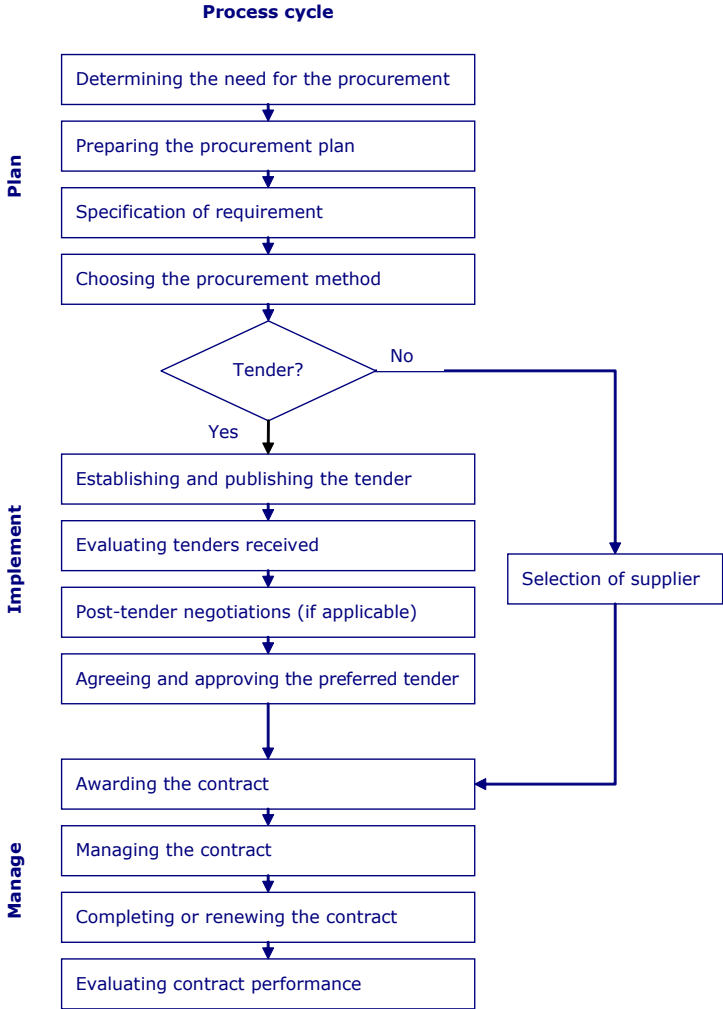
- Auditing of efficiency – Office of the Auditor General of Canada, 1995
- Contract management - Comments on proposed services acquisition reform act, United States Government Accountability Office, 2003
- Federal acquisition – Progress in implementing the services acquisition reform act of 2003, United States Government Accountability Office, 2005
- Getting value for money from procurement/How auditors can help? – National Audit Office / Office of Government Commerce (England)
- Improving procurement, National Audit Office (England), 2004
- Improving procurement, part 2, National Audit Office (England), 2004
- Modernising construction, National Audit Office (England), 2001
- Modernising procurement, National Audit Office (England), 1999
- Procurement - A Statement of good practice, Office of the Controller and Auditor-General (New Zealand), 2001
- Purchasing professional services, National Audit Office (England), 2001

MICRO LEVEL - ASSESSMENT OF A SINGLE PROCUREMENT PROJECT:

16. Is the procurement project efficiently managed?

Why important?

The different steps of the supply process have to be executed with the sufficient care. The following process cycle intends to show the different stages to be considered. 3 main categories (plan, implement and manage) can be defined within the process cycle.







## Procurement performance model

### Questions

- Are the right skills, experiences and competencies present in the acquisition workgroup and are the necessary outside specialists involved in part of the process?
- Does the procurement unit have sound commercial awareness and knowledge of suppliers and the market?
- Do procurement staff, supplier and end user communicate properly?
- Is confidentiality guaranteed during the whole process?

### Process cycle:

#### Plan:

- Is it calculated whether aggregated procurement can be more cost-efficient?
- Is an appropriated degree of standardization of goods and services respected?
- Is the foreseen budget compared with similar projects or procurements yet realised (historical standards)?
- Is a cost/benefit analysis, a cost/effectiveness or a financial analysis considering life-cycle costs performed and is the funding of the procurement guaranteed?
- Is a risk evaluation performed?
- Is the appropriate procurement approach being chosen (considering for example the possibility of contracting out work or procuring low value items through a specific low cost procuring system)?
- Are incentives to deliver on time and in quantity properly specified?

#### Implement:

- Are there written rules on requirements for the specific quote and tender used in the transaction and are they applied?
- Are there complementary rules to be used and are they applied? (e.g. emergency)
- Is the opportunity properly published?
- Is there time waste during tendering?
- Are information technology resources (e-procurement) used to reduce costs?
- Is the tender clearly and properly specified, including evaluation criteria and knowing about the market and therefore not over-prescriptive and receptive to innovation?
- Are prequalification criteria of suppliers (size of company, track record and experience of the company with government bodies, capacity for suppliers to take on risk from the contracting body, price, environmental criteria) properly defined and applied?

- Are tenders who do not comply with the requirements specified in the request for tenders rejected?
- Is evaluation of tenders objective and transparent and based solely on the published criteria?
- Is the contract awarded to the tender who best meets the relevant criteria?

### **Manage:**

- Is the chosen supplier part of the department's database? Is it even a key supplier?
- Does the contract meet criteria of completeness and consistency?
- Are unsuccessful companies informed why their tender failed?
- Does the contract include performance-based clauses?
- In case of time and material and labour hour contracts, do the surveillance give an adequate and reasonable assurance that the contractor is using efficient methods and effective cost controls?
- Are review meetings organised during contract execution and do they meet demand?
- Are contract changes after awarding properly justified and executed?
- Are internal control mechanisms performed before payments?
- Are the established budget and timetable (milestones) respected?
- Has late payment interests to be rewarded and could they have been avoided?
- Are there any complaints of the suppliers and/or end-users?

### **Guidance**

- Auditing of efficiency – Office of the Auditor General of Canada, 1995
- Contract management – Comments on proposed services acquisition reform act, United States Government Accountability Office, 2003
- Federal acquisition – Progress in implementing the services acquisition reform act of 2003, United States Government Accountability Office, 2005
- Getting value for money from procurement/How auditors can help? – National Audit Office / Office of Government Commerce (England)
- Improving procurement, National Audit Office (England), 2004
- Improving procurement, part 2, National Audit Office (England), 2004
- Modernising construction, National Audit Office (England), 2001
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- Procurement - A Statement of good practice, Office of the Controller and Auditor-General (New Zealand), 2001
- Purchasing professional services, National Audit Office (England), 2001



## Procurement performance model

### MICRO LEVEL - ASSESSMENT OF A SINGLE PROCUREMENT PROJECT:

17. Are there appropriate controls in place to ensure that the procurement project complies with relevant legislation?

### Why important?

Public procurement legislation contains rules concerning the process of acquiring goods, works and services by public sector entities. The primary purpose of such legislation is often to encourage economy and efficiency in the use of public funds - to give value for money. The essence of public procurement legislation is to define and implement the procedures that are most likely to produce an economic and efficient result, while respecting the public nature of the process, free competition and the duty of fairness to the suppliers.

### Questions

- Is there a legal authority for the procurement project?
- Are existing suppliers that have a special right to be consulted being contacted?
- Does the procurement project comply with European Communities' regulations and rules?
- Do appropriate controls ensure that procurement decisions are not biased by conflicts of interest or corruption?

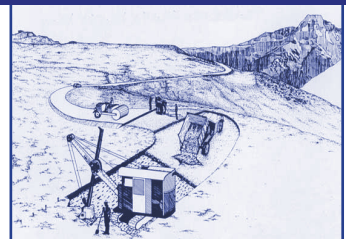
### Guidance

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- Purchasing professional services, National Audit Office (England), 2001





# Checklists for Financial and Compliance Audit of Public Procurement





# CHECKLISTS FOR FINANCIAL AND COMPLIANCE AUDIT OF PUBLIC PROCUREMENT

## INTRODUCTION

The scope of public procurement is broad and incorporates a wide range of activities, including acquiring goods and services at an appropriate quality and quantity, bundling supply needs with other departments, outsourcing services and establishing partnerships with suppliers. In all cases the public body has to choose a supplier and pay for the goods delivered or service provided. In most of the EU Members States, procurement represents between 25% to 30% of public spending.

Supreme Audit Institutions (SAIs) audit the use of public resources and, depending on mandates, may also promote sound management principles and the attainment of value. The audit mandates and activities of SAIs vary, as do national budgeting systems and public procurement regulations. Drafting a common checklist to be used when auditing public procurement processes was a difficult task, not least because we had to produce a document which was relevant and applicable to auditors operating within different frameworks, objectives, requirements and procedures.

An auditor may examine the procurement function as part of an audit of the accounts of a specific public authority. Alternatively he/she may be interested in examining specific areas or procedures and in considering efficiency, competition, fraud and corruption, regularity, fitness for purpose or value added. Some SAIs may strive to recommend good practice while others may concentrate on matters of compliance and the action taken in response to identified irregularities.

The checklists were prepared on the basis of common principles and procedures having regard to:

- An analysis of the contributions received from several of the SAIs, which led us to conclude that all of them focus on the robustness of the procurement function, meeting public needs, competition objectives and transparent procedures;
- EU Member States are bound to the basic precepts of the EU Treaty and of the Directive 2004/18/EC <sup>1</sup>;

<sup>1</sup> Although there are other EU regulations on public procurement, this checklist always refers to Directive 2004/18/EC ruling.



## Checklists for financial and compliance audit

- No matter which national or local regulation is followed, State authorities must respect the requirements of a competitive process and make its decisions in a transparent way which respects all participants equally. In particular it must not discriminate on the grounds of nationality;
- Procurement is a risk area for fraud and corruption and they usually result in the misuse of public resources.

While the checklists closely follow the requirements of the EU Directive, they are general in nature and are applicable to purchases falling below the EU threshold limits. They also address some relevant questions not included in the EU Directive, e.g. organisational issues. In addition, we have placed emphasis on aspects which we know from experience are prone to failure and irregular influence.

When using these checklists, the auditor should keep in mind that:

- The evaluation of public procurement processes may be only a part of the audit (as in the case of a financial audit), and, thus, the proposed questions may have to be integrated within the broad methodology of that audit;
- Depending on assessed risks, not all questions will be applicable to each audit;
- According to audit mandates and national systems, some items may have to be modified or questions added. For instance, financing through national, state or local budgets will put the procuring entity under the obligation of following the relevant national, state or local financial and procurement regulations;
- Where an audit is planned to include value for money questions, items from these checklists should be considered along with those included in the Procurement Performance Model.

The checklists begin with an analysis of the procurement function, and thereafter is organised according to the main stages of the procurement process such as pretender stage, choice of






procurement procedure, publicity and notifications used, identification of potential bidders, evaluation of tenders and award procedure. A specific attention is given to additional works and supplies as a frequent form of direct contracting.

Each chapter has a number of main questions, which are then presented in the following format:

- **Background**, explaining the importance and giving some relevant information;
- **Questions**, detailing the areas and directions in which that item should be investigated;
- **Guidance**, identifying documents that the auditor should consider in relation to the item under analysis:
  - The relevant parts of the Directive 2004/18/EC;
  - The related sections of the Guideline for Auditors;
  - Questions included in the Procurement Performance Model;
  - Important judgements of the European Court of Justice (ECJ Case-Law);
  - Audit reports and studies produced by SAIs<sup>2</sup>.

Since public procurement is one of the activities creating more opportunities for corruption, which originate damages estimated between 10% to 50% of the contract value, we have included a fraud and corruption perspective in this checklists. Where the audit emphasis is on fraud and corrupt practices, then the auditor should take special note of those questions highlighted with the following red flag: . If the answer to those questions is “**No**” increased risks of fraud and corruption are probable and further analysis is needed<sup>3</sup>.

<sup>2</sup> Summaries, details and links to these reports are included in “*Supreme Audit Institutions Summaries of Procurement Studies*” or can be obtained by contact with the concerned SAI.

<sup>3</sup> See AFROSAI-E guideline “*Detecting fraud while auditing*” for a global approach, for fraud checklist and for audit procedures, risks and suggested controls for selected audit areas, including procurement (on request to AFROSAI-E).

For types of fraud and corruption in contracts and warning signs of possible fraud and corruption in contracts see “*ASOSAI Guidelines for Dealing with Fraud and Corruption*” in <http://www.asosai.org/guidelines/guidelines1.html>. See also *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD, 2005





### 1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

- 1.1 Are procurement processes well organised and documented?
- 1.2 Are proper financing arrangements taken?
- 1.3 Are internal control systems in place?
- 1.4 Is procurement execution duly monitored and documented?

### 2. AUDITING THE PREPARATION OF THE PROCUREMENT

- 2.1 Are EU procurement regulations applicable?
- 2.2 Did the public authority calculate the contract value accurately?
- 2.3 Was the performance description adequate to needs and legal requirements?
- 2.4 Were the tender documents comprehensive, transparent and free from restrictions or conditions which would discriminate against certain suppliers?
- 2.5 Was the submission of variant tenders accepted and duly ruled?
- 2.6 Has the public authority procedures in place to monitor the input of experts employed to assist the procurement function?

### 3. AUDITING THE PROCEDURE CHOSEN TO PROCURE

- 3.1 Did the public authority decide upon an adequate and admissible procurement procedure?
- 3.2 Did the chosen procedure ensure fair competition and transparency?

### 4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED

- 4.1 Did the public authority report procurement processes and results in compliance with the Directives?
- 4.2 Was timely and equal access to contract documents and information provided to all candidates?
- 4.3 Was confidentiality ensured when necessary?

### 5. AUDITING THE AWARD PROCEDURES

- 5.1 Was the formal review of requests to participate or evaluation of bids correctly undertaken?
- 5.2 Was suitability of candidates accurately assessed?
- 5.3 Were exclusion causes duly considered before the actual evaluation of tenders?
- 5.4 Were bids properly evaluated?
- 5.5 Was the decision on the award process accurate and adequately communicated?

### 6. AUDITING ADDITIONAL WORKS OR DELIVERIES

- 6.1. Were any additional works or deliveries admissible, without recourse to a new procurement procedure?





### I. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

#### I.1. Are procurement processes well organised and documented?

##### Background

The organisation and assignment of responsibilities within the procurement process is critical to the effective and efficient functioning of that process.

The public authority must document all measures and decisions taken in a procurement process, in order to be able to follow progress, to review it when necessary and to support management decisions.

This organisation and documentation measures also form the basis for financial and compliance controls applied in the procurement process.

##### Questions

- F/C** • Are the functions and responsibilities of those involved in the procurement function clearly established and documented?
- Have guidelines incorporating the principles and objectives of a robust procurement practice been established?
- F/C** • Are procurement processes organised and documented and include: needs to be addressed, contract performance description, documentation, notifications, award procedure and decision, draft and concluded contract, physical execution and payments made?
- F/C** • Are procedures conducted by electronic means sufficiently recorded and documented, making the audit trail easy to follow?
- Do staff involved in the various stages of the process have the appropriate skills and training to perform their duties effectively?
- F/C** • Are procurement proposals initiated, processed and approved by authorized officers, with no cases of overstepping?
- F/C** • Are there no cases of documents missing, altered, back-dated or modified or after-the-fact justifications?

### Guidance

- **Directive<sup>4</sup>:**

For records of e-procedures see article 43.

- **PPWG Procurement Performance Model (PPM):**

For procurement strategy see n° 7 of PPM.

For organization of the procurement function see n° 8 of PPM.

For organization of the procurement process see n° 9 of PPM.

For staff's skills, experiences and competencies see n°s 10 and 16 of PPM.

For risks relating to internal and external environments see n° 13 of PPM.

For capturing and using performance data see n° 14 of PPM.

- **Audit reports and studies:**

**For clear identification of functions:**

Report	SAI
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Management of procurement at the Ministry of Environment	Estonia

**For the need of guidelines:**

Report	SAI
Contract marketing and promotion expenditure	Belgium
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	“
Procurement of maintenance services	Estonia
Statistics Finland's service procurements	Finland
The Defence administration's procurement activities – supply procurement	“
Audit on the operation of the Hungarian Defence Forces public procurement systems projects	Hungary

<sup>4</sup> It always refers to Directive 2004/18/EC



### For the organization, documentation and filing of procurement processes:

Report	SAI
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium
Consultancy contracts awarded by ministerial cabinets	»
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Statistics Finland's service procurements	Finland
Universities' procurement activities	»
Procurements of system work and ADP consulting services by the tax administration	»
Annual report on federal financing management, Part II	Germany
Contracts of assistance, consultancy and services awarded by the Foundation for Further Education. financial years 1996 to 1998	Spain

### For qualification of procurement staff:

Report	SAI
Improving public services through better construction	UK
Improving IT procurement: the impact of the Office of Government Commerce's initiatives on departments and suppliers in the delivery of Major IT-enabled projects	UK

### For competency issues:

Report	SAI
Contract marketing and promotion expenditure	Belgium
Roads, motorways and waterways maintenance leases	Belgium







### I. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

#### I.2. Are proper financing arrangements taken?

### Background

The financing of procurement contracts is particular to the budgetary framework applicable to the public body and in operation in the Member State. In examining procurement during the financial audit process, many audit approaches examine the financing arrangements as part of their testing of compliance with national legislation, financial rules and authorities.

### Questions

- F/C** • Has the procurement under review and the related funding been approved at the appropriate level (e.g. government, ministry, board, head of body)?
- Is this funding legal or otherwise in compliance with relevant national laws or procedures governing the financing of this type of contract?
- Have the funding arrangements been agreed where payments take place over several financial periods?
- F/C** • Does the approved level of funding correspond to the estimated value of the contract calculated for the purpose of the procurement process?
- Is funding made available for payments under the contract at the appropriate time and in accordance with the relevant national/public financial procedures?
- Where funding is being arranged by borrowings, do these have the necessary approval and legal authority?

### Guidance

- Check national financial regulations
- **PPWG Procurement Performance Model (PPM):**  
For risk of external environment/budgetary constraints see nº 13 of PPM
- **Audit reports and studies:**

#### For budgetary funding issues:

Report	SAI
Contract marketing and promoting expenditure	Belgium
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Management of procurement at the Ministry of Environment	»
The Finnish state's payment traffic procurement	Finland
Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System-1999 and 2000	Spain



### I. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

#### 1.3 Are internal control systems in place?

#### Background

The procurement process interacts with the other financial controls that have been established in order to safeguard assets and prevent fraud or financial error. In some financial audit approaches the procurement process is examined as an integral part of the system of internal control.

#### Questions

- F/C** • Is there a system in place which controls requisitions, records contract performance and payments made and which sets out:
  - o Those responsible for the various procedures including assessment of needs and authorisation levels
  - o Data to be recorded
  - o Specific procedures to be adopted in ordering goods and services under agreed contract(s)
  - o Procedures for verifying that goods/services have been properly delivered/performed and are in accordance with the contract terms
  - o Procedures for approving payments, including reconciling claims made under the contract to delivery/performance records and checking the arithmetical accuracy of the payment requests
  - o Management monitoring of transactions and balances?
  - o Enforcement of compliance in case contractors fail to meet contract terms
  - o Regular accounting reconciliations of contract payments, transactions and inventory?
- F/C** • Is there appropriate segregation of duties between those procuring services, requisitioning goods/services, verifying the performance of the contract and approving payments?
- F/C** • Have mechanisms to avoid conflicts of interests in the procurement processes been established?

## Checklists for financial and compliance audit

- F/C** • Are there no indications or evidences of conflicts of interest by officers authorizing transactions or by members of committees involved in the procurement processes?
- F/C** • Are there no indications or evidences of repeated, unusual or unnecessary contacts by officers authorizing transactions or by members of committees involved in the procurement processes with contractors?
- F/C** • Does an appropriate official review the procurement process on an ongoing basis to ensure that it is in compliance with applicable rules?
- F/C** • Do controls exist for e-procedures and records, covering in particular:
  - o Access to data, including standing data, and the identification of restriction levels and authorised personnel?
  - o Proper and complete records of transactions and events are maintained?
  - o Transactions are properly verified after input or modification?
  - o Is data securely stored?
- F/C** • Are there no materials provided to contractors who, according to the contracts, are supposed to provide them (such as office space, furniture, IT equipment) and no cases of employees from the contracting authority performing parts of contracted work?
- F/C** • Are cases of double payment duly prevented and corrected?

### Guidance

- **Directive:**

For records of e-procedures see article 43.

- **PPWG Procurement Performance Model (PPM):**

For the organization of the procurement function see n° 8 of PPM.

For public procurement function controls see n° 11 of PPM.

For risk management see n° 13 of PPM.

For malpractice and fraud in the procurement function see n° 14 of PPM.

For conflicts of interests and corruption see n° 17 of PPM.



- Audit reports and studies:

**For the need of an effective internal control system:**

Report	SAI
Contract marketing and promotion expenditure	Belgium
Execution of economic compensations associated with the purchase of specific military equipment	“
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	“
Management of public procurement at the Ministry of Interior and its governing area	Estonia
File, storage, safekeeping or management of medical histories and past procurement or in force in 1999 and 2000 on this activity for a sample of public hospitals of the National Health System	Spain
Modernising procurement in the prison service	UK
Improving IT procurement: the impact of the Office of Government Commercies' initiatives on departments and suppliers in the delivery of major IT-enabled projects	“

**For the need of clear segregation of duties:**

Report	SAI
Contract marketing and promotion expenditure	Belgium
Public investment projects by the National Laboratory for Civil Engineering	Portugal

**For preventing conflicts of interests:**

Report	SAI
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium
Procurement of consultancy services	Denmark





### I. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

#### I.4. Is procurement execution duly monitored and documented?

#### Background

Monitoring of contracts and the procurement process allows management to assess over time the effectiveness of procurement controls, contract performance and compliance with financial and other legal authorities, reducing scope for misuse of public resources. It involves assessing procurement execution and related controls on a timely basis and taking necessary corrective actions.

#### Questions

- F/C** • Are the responsibilities for monitoring the execution and performance of contracts clearly assigned?
  - Are those responsibilities discharged by persons
    - o With the appropriate authority to take actions in the event of non-compliance?
    - o With the appropriate skills, technical knowledge and/or ability to effectively ensure the proper execution and performance of the contract?
  - Are reports based on sound data available to those responsible for monitoring the performance of contracts?
- F/C** • Are order quantities, deliveries and payment levels under the contract monitored by an appropriate official?
- F/C** • Does an appropriately qualified official check the quality of performance against the contract terms?
- F/C** • Are there systems for recording and managing stocks (where part of contract)?
- F/C** • Are there established procedures for dealing with and documenting non-performance and return of goods?
- F/C** • Is there an adequate and appropriate record for monitoring performance and any resulting or follow up actions?

### Guidance

- **PPWG Procurement Performance Model (PPM):**

For regular evaluation of the procurement function see n. 8 of PPM.

For public procurement function controls see n° 11 of PPM.

For evaluation of suppliers' performance see n° 12 of PPM.

For malpractice and fraud in the procurement function see n° 14 of PPM.

- **Audit reports and studies:**

**For the need of specialized staff/expertise in procurement:**

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Annual Report concerning the financial year 2000, OJEC15-12-2001, page 318-328.	ECA
The Defence Administration's procurement activities – supply procurement	Finland
Improving public services through better construction	UK

**For the need of clear description of responsibilities:**

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Management of procurement at the Ministry of Environment	"
Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System- 1999 and 2000	Spain
Ministry of Defence: the rapid procurement of capability to support operations	UK

**For control on contract performance:**

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Execution of economic compensations associated with the purchase of specific military equipment	"
Framework contracts: the Federal Central Buying Office's operation examined in terms of sound management and legality	"
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	"
The procurement of public transport services	Finland
Procurement awarded by the Provincial Delegations, financial year 2002, regarding the services of Home Assistance	Spain
Annual audit report of the autonomous (regional) and local public sectors, financial year 1996. Item concerning "Public procurement"	"
Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System- 1999 and 2000	"





### 2. AUDITING THE PREPARATION OF THE PROCUREMENT

#### 2.1. Are EU procurement regulations applicable?

##### Background



There are two main EU Directives setting up detailed rules for the award of public works, supplies and service contracts in the EU Member States: Directive 2004/18/EC and 2004/17/EC. The first one generally applies to most of the contracts and the second one coordinates specifically the procurement procedures of entities operating in the water, energy, transport and postal service sectors.

Basically, public authorities are obliged to observe the rules of the Directives provided the contract exceeds a certain threshold. In addition, the rules may also be applicable where public authorities subsidised contracts by more than 50%, or where an entity is granted special or exclusive rights to carry out a public service activity. Contracts below EU thresholds values and some other contracts explicitly excluded from the scope of application are not covered by those Directives. So, one must go through the complex rules and exemptions from the application of EU rules to determine when a contract is subject to the specific requirements.

Applying EU procurement regulations means that the public authority must follow certain procedures, recognise its obligations under the principle of fair competition, including advertising and transparency requirements, measures and decisions which allow all participants to operate on an equal basis, and avoiding any kind of discrimination, including for reasons of nationality.

One further point of interest — the European Court of Justice (ECJ) has confirmed that the Internal Market rules of the EC Treaty apply also to contracts outside the scope of the Public Procurement Directives. According to ECJ's case law, an obligation of transparency exists for all contracts sufficient to enable the market to be opened up to competition through advertising contract details and by the application of fair and impartial procedures.

### Questions

- Is a contract being awarded for works, supply of products or provision of services?
- Is the contractor a “contracting authority”, as defined in the Directive, is it a public works concessionaire or is the specific contract subsidised by more than 50% by a “contracting authority”?
- Has the public authority estimated that the value of the contract will exceed the thresholds of the Directive?
-  • Are contracts which have several component parts qualified according to the component of greatest value and were the correct thresholds used?
-  • Where the public authority cites exemptions pursuant to articles 12-18 of the Directive, have the special requirements for those exemptions been proved?

### Guidance

#### • Directives:

For definitions of “public contract” and “contracting authority” see articles 1(2) and (9) and Annex III. See also articles 1(3), 3 and 63 for other situations.

For exemptions see articles 12 to 18, 57 and 68.

For thresholds see articles 7 and 8, as amended by Commission Regulation (EC) 1177/2009, of 30 November 2009, published in the OJEU L314, of 1 December 2009, and be aware that thresholds are set forth every two years by the European Commission.

See articles 7 and Annexes II, IV and V for specific rules for products in the fields of defence and services in the field of research and development, telecommunications and others.

For contracts in the water, energy, transport and postal service sectors see Directive 2004/17/EC.

For qualification of contracts see articles 1, 10, 12-14, 16 and 20-22.

For contracts in the field of defence and security see Directive 2009/81/EC.

- See also [Commission Interpretative Communication](#) 2006/C 179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, including references to the relevant ECJ case-law.

## Checklists for financial and compliance audit



- **PPWG Guideline for Auditors:**

See n.º 2 (Scope of Directive 2004/18/EC) and 8 (Thresholds) and Appendix II.

- **PPWG Procurement Performance Model (PPM):**

For compliance with EU law see n. 17 of PPM.

- **ECJ Case-Law:**

Case	Judgement	Issue
C-31/87, Beentjes	1988.09.20	Contracting authorities
C-44/96, Mannesmann	1998.01.15	"
C-323/96 Commission/Belgium	1998.09.17	"
C-360/96, Arnhem and Rheden/BFI	1998.11.10	"
C-353/96, Commission/Ireland	1998.12.17	"
C-275/98, Unitron Scandinavia	1999.11.18	"
C-380/98, University of Cambridge	2000.10.03	Contracting authorities/ Definition of public financing
C-237/99, Commission/France	2001.02.01	Contracting authorities
C-223 and 260/99, Agora and Excelsor	2001.05.10	"
C-470/99, Universale-Bau	2002.12.12	"
C-373/00, Adolf Truley	2003.02.27	"
C- 214/00, Commission/Spain	2003.05.15	"
C-18/01, Korhonen and others	2003.05.22	"
C-283/00, Commission/Spain	2003.10.16	"
C-84/03, Commission/Spain	2005.01.13	"
C-107/98, Teckal	1999.11.18	Contracting authorities/ In-house contracting
C-26/03, Stadt Halle and RPL Lochau	2005.01.11	Contracting authorities/ In-house contracting
C-295/05, Asemfo/Tragsa	2007.04.19	"
C-324/07, Coditel	2008.11.13	"
C-573/07, Sea Srl/Comune di Ponte Nossa	2009.09.10	"
C-29/04, Commission/Austria	2005.11.10	"
C-480/06, Commission/Germany	2009.06.09	Administrative cooperation in the performance of public tasks
C-331/92, Gestión Hotelera Internacional	1994.04.19	Mixed contracts
C-16/98, Commission/France	2000.10.05	Definition of public works contract
C-411/00, Felix Swoboda	2002.11.14	Qualification of services – Annex II A or II B/ Contract award procedures
C-126/03, Commission/Germany	2004.11.18	Applicability of public procurement procedures
C-458/03, Parking Brixen	2005.10.13	Public service concession
C-264/03, Commission/France	2005.10.20	Obligation to respect the fundamental rules of the Treaty for public contracts excluded from the scope of public procurement Directives

## Checklists for financial and compliance audit

- Audit reports and studies:

**For the need of complying with the basic standards of the EC Treaty:**

Report	SAI
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium



### 2. AUDITING THE PREPARATION OF THE PROCUREMENT

#### 2.2. Did the public authority calculate the contract value accurately?

#### Background

A public authority must not split a contract in order to remain below thresholds in order to avoid the scope of the Directive or of the national law. In this context the calculation of values shall be comprehensive and take account of any form of option (i.e. possible additional supplies or services) and renewals.

#### Questions

- Did the public authority identify the full contract value and include options and provisions for renewals?
- Was the estimation of contract value in accordance with the criteria fixed in the Directive?

**F/C** • Is there no evidence that the works or supply required was subdivided in order to remain below levels of authorisation or procedure?

**F/C** • Was the estimated contract value based on realistic and updated prices?

**F/C** • Was the estimated contract value in line with the final cost of the contract awarded?

#### Guidance

- Directive:

For methods for calculating the contract value see articles 9 and 67(2)

- PPWG Guideline for Auditors:

See n.<sup>os</sup> 8 (Thresholds) and 9 (Estimation of Values)

## Checklists for financial and compliance audit

- ECJ Case-Law:

Case	Judgement	Issue
C-16/98, Commission/France	2000.10.05	Artificial splitting of a single work

- Audit reports and studies:

**For estimation of contract value:**

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels	Belgium
Construction of the "Deurganckdock" (Antwerp Container Terminal Complex)	"
Bus line services: cost price and contract award to operators	"
Audit over a Rail Transport Institute	Portugal

**For splitting of contracts to remain below levels of authorisation or procedure:**

Report	SAI
Consultancy contracts awarded by ministerial cabinets	Belgium
Public investment projects by public rail transport enterprise	Portugal
Integrated project of the Northern Railroad	"
Procurement awarded during the financial year 2002 by the state public sector	Spain
Autonomous (regional) and local public sectors. Financial year 2000. Item concerning "Public Procurement"	"
Procurement by the State public sector during the financial years 1999, 2000 and 2001	"



### 2. AUDITING THE PREPARATION OF THE PROCUREMENT

#### 2.3. Was the performance description adequate to needs and legal requirements?

##### Background

The performance description is the heart of the procurement procedure as it is here that the public authority defines its needs and the requirements the tenders must meet. Unjustified or inaccurate needs assessment may lead to purchase unnecessary goods or services.

Performance should be described unambiguously and comprehensively, so that all bidders have a clear understanding of what is required, so as to ensure that the detail in the tender documents received are comparable and in order to avoid that suppliers deliver less than expected.

In particular, the performance description must comply with the principles of equal treatment and transparency and may not discriminate in favour of any product or service. This means that the public authority is not entitled to require specified products unless justified by the subject matter of the contract. The issue of technical specifications is particularly sensitive because, by means of unjustified technical requirements, obstacles to competition and favouritism towards certain suppliers may take place within an apparent open competition.

In addition, from the time notices are published performance under the contract has to remain unchanged during the procedure and shall form the centre of the resulting contract. In some procedures, like the negotiated ones, it is admissible that some items of the tenders may be adapted, provided the character of the performance remains unaltered and requirements and specifications are respected.

In the case of particularly complex contracts a dialogue with tenderers may be used to identify and define the means best suited to satisfy the requirements. For this case a competitive dialogue procedure may be adopted, through which the contracting authority identifies the solution(s) capable of meeting its needs, following procedures that shall ensure equality of treatment among all tenderers.

### Questions

- F/C** • Was there reasonable justification for the need of the purchase, namely when made towards the end of the financial year?
- F/C** • Were the performance conditions under the contract comprehensive and unambiguous?
- F/C** • Was the public authority specific about the nature and scope of the performance before launching the procurement process?
  - Did the public authority consider and evaluate alternatives, like bundling needs with other departments or grouping supplies in separate lots with different characteristics?
- F/C** • Was the performance described clearly, unambiguously and comprehensively, giving precise definition of the characteristics of what was to be supplied, so that all concerned had an equal understanding of requirements and that clarification or amendments are not necessary?
  - Could the bidders assess the economic risks the successful bidder would be responsible for, thus limiting the inclusion of extra charges for risk?
- F/C** • Were technical requirements set strict enough to guarantee the desired performance without being unnecessarily tight to exclude favourable bids that don't comply with all requirements?
- F/C** • Did technical specifications (required characteristics of a material, product, supply or service) afford equal access for tenderers, containing no feature that directly or indirectly discriminate in favour, or against, any bidder, product, process or source?
- F/C** • Were technical specifications formulated by reference to performance or functional requirements admitted by the Directive?
- F/C** • Did technical specifications exclude any reference to a specific make or source, to a particular process, to trade marks, patents, types or to a specific origin or production, thus preventing favouring or eliminating certain undertakings or products?
- F/C** • When such references were made, was a precise description of the performance not otherwise possible and were those references accompanied by the words "*or equivalent*"?





- F/C** • Did the performance description remain unchanged once the notifications had been published?
- F/C** • If the public authority has changed the performance description unilaterally:
  - o Was the scope of change relevant and admissible?
  - o Have the participants been informed in an equal manner?
  - o Was it conceivable that, under the assumption that the amended performance description had been the basis for the original competition, more bidders might have applied or submitted an offer?
  - o In that case, was the competition reopened?
- F/C** • If negotiations or fine-tunings of the tenders have taken place, were these such that they were in accordance with the type of procedure used and were there no substantial changes to the performance specifications described in procurement documents?
- When a competitive dialogue was used, did the contracting authority inform the participants when the dialogue was concluded and invite them to submit final tenders, describing the solution(s) and the elements required and necessary for the performance of the project?

### Guidance

- **Directive:**

For detailed information about admissibility of technical specifications see article 23 and Annex VI.  
The requirements for product neutral performance descriptions are codified in article 23 (8).

- **PPWG Procurement Performance Model (PPM):**

For matching the goal of the procurement process with the users' needs see n. 15 of PPM.  
For the planning of the public procurement process see n° 16 of PPM.

## Checklists for financial and compliance audit

- ECJ Case-Law:

Case	Judgement	Issue
C-45/87, Commission/Ireland	1988.09.22	Technical specifications defined according to national technical standards
C-3/88, Commission/Italy	1989.12.05	Forms of discrimination which lead to the same result as discrimination by reason of nationality
C-243/89, Commission/Denmark	1993.06.22	Discrimination based on the request to use the greatest possible extent of national products and labour
C-359/93, Commission/Netherlands	1995.01.24	Technical specifications defined by reference to a trade mark, without adding the words "or equivalent"

- Audit reports and studies:

Report	SAI
Performance Description	Germany

**For the lack of a clear definition of the main components of the contract ("stock contract technique):**

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels	Belgium

**For contracts leaving many and important issues uncovered:**

Report	SAI
Outsourcing of the data processing function at the Ministry of the Flemish Community	Belgium
Damage compensations in public works	"

**For justification of purchases:**

Report	SAI
Funds spent on acquiring- Czech Statistical Office headquarters	Czech Republic



### 2. AUDITING THE PREPARATION OF THE PROCUREMENT

#### 2.4. Were the tender documents comprehensive, transparent and non-discriminating?

##### Background

In addition to the performance description the tender documents provide all the relevant conditions for the competition.

They inform the bidders about content and form of the documents they have to submit in order to verify their professional and financial ability and all the necessary declarations that the public authority requires. The public authority has some discretion concerning the requirements and verification it seeks, provided they are justified by the subject matter of the contract. Furthermore, the public authority should be aware that unnecessary strict requirements limit competition and reduce the scope for value for money.

Most notably the tender documents indicate the award criteria and the sub-criteria for the evaluation of the most advantageous offer and their weighting. Clear, objective and admissible criteria are crucial for impartial and transparent awards, reducing scope for arbitrary and corrupt decisions.

##### Questions

- F/C** • Did the bidders have a clear understanding of which documents and declarations had to be presented with the tender?
- F/C** • Could bidders learn all relevant information straight from the tender documents? Did the public authority make sources of information beyond the tender documents equally available for all the candidates?
- F/C** • Did tender documents fix the requirements for the suitability of bidders, concerning
  - o Minimum capacity levels of economical and financial standing
  - o Minimum capacity levels of technical and/or professional ability
  - o Required standards of quality assurance or environmental management?

## Checklists for financial and compliance audit

- F/C** • Were standards, certifications and evidence required admissible under the Directive?
- F/C** • Were the extent of information, the levels of ability and the standards required related and proportionate to the subject matter of the contract, avoiding unnecessary restrictions and verifications?
  - Did the public authority abstain from unnecessary verification in terms of the scope and deadline to prove the bidders capability?
- F/C** • Where the public authority weighted selection criteria, did it publish the weightings in advance of the receipt of the tenders?
- F/C** • Has the public authority defined clearly the award criteria?
- F/C** • Where the award criteria was the most economically advantageous tender, were:
  - o Sub-criteria clearly indicated?
  - o Relative weighting of each sub-criteria or a range with an appropriate maximum spread specified?
  - o The sub-criteria listed in descending order of importance where it was not possible to state weighting values in advance?
  - o The sub-criteria different from those defined in the qualification of bidders?
- F/C** • Are those sub-criteria linked to the subject matter of the contract, reflecting the main focus and the importance of the elements of the performance?
- F/C** • Is the weighting set coherent, convincing and leaving little scope for arbitrary and random evaluation and ranking?
  - Are criteria and sub-criteria set suitable to identify the tender that offers best value for money? Has price been given a reasonable weighting?
  - When the public authority set social or environmental conditions for the performance of the contract, were these compatible with EU law and was adequate information given to the candidates?
- F/C** • Were there no inconsistencies between the several tender documents?



### Guidance

#### • Directive:

For document requirements see articles 40, 44 and 47 to 52.

For requirements concerning the suitability of tenderers see articles 44 to 52.

For award criteria see articles 40 and 53.

For performance conditions see articles 26 and 27.

- See also **Interpretative Communications of the Commission COM (2001) 566** final from 15.10.2001, for integrating social considerations into public procurement and **COM (2001) 274** final from 04.07.2001, about the possibilities for integrating environmental considerations.

#### • PPWG Guideline for Auditors:

See n.º 4 (Criteria for awarding contracts) and 16.

#### • PPWG Procurement Performance Model (PPM):

See nº 16 of the PPM, about the implementation of the public procurement process and nº 17 about the compliance with EU law.

#### • ECJ Case-Law

Case	Judgement	Issue
C-76/81, Transporoute	1982.02.10	Criteria for qualitative selection
C-27-29/86, CEI and Bellini	1987.07.09	"
C-31/87, Beentjes	1988.09.20	Criteria for qualitative selection/ Requirements of the most advantageous tender criterion/ Condition related to the employment of long-term unemployed persons
C-360/89, Commission/Italy	1992.06.03	Criteria for qualitative selection: prohibition of discrimination that favours companies with offices in the region where the works are to be carried out or establishes a preference for temporary associations including undertakings with their main activities in that region
C- 3/88, Commission /Italy	1989.12.05	Principle of non-discriminatory treatment: forms of discrimination which lead to the same result as discrimination by reason of nationality

## Checklists for financial and compliance audit

Case	Judgement	Issue
C-21/88, Du Pont de Nemours	1990.03.20	Principle of non-discriminatory treatment: national rules cannot reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts
C-274/83, Commission/Italy	1985.03.28	Applicability of the most advantageous tender criterion
C-272/91, Commission/Italy	1994.04.26	Restriction of participation in a public procurement procedure to bodies the majority of whose capital is held by the public sector infringes common market fundamental freedoms
C-225/98, Commission/France	2000.09.26	Admissible criteria in the most advantageous tender criterion/ Criteria for qualitative selection: reference to classification of national professional organisations
C-16/98, Commission/France	2000.10.05	Principle of non-discrimination between tenderers
C-94/99, ARGE Gewässerschutz	2000.12.07	Principle of equal treatment: participation of tenderers receiving subsidies from contracting authorities enabling them to submit tenders of lower prices than the ones of their competitors
C-19/00, SIAC Construction	2001.10.18	Admissible criteria for the award of a public contract
C-513/99, Concordia Bus Finland	2002.09.17	Admissible criteria for the award of a public contract, depending on the subject-matter of the contract
C-470/99, Universale-Bau	2002.12.12	Weighting of criteria for qualitative selection of the candidates invited to tender in a restricted procedure
C-315/01, GAT	2003.06.19	Non admissible contract award criteria
C-448/01, EVN and Wienstrom	2003.12.04	Admissible "green" contract award criteria
C-247/02, Sintesi	2004.10.07	National rules cannot preclude the right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender
C-340/02, Commission/France	2004.10.14	Principles of equal treatment and transparency: the subject-matter of each contract and the award criteria should be clearly defined

### • Audit reports and studies:

#### For absence of information in the procurement process:

Report	SAI
Roads, Motorways and waterways maintenance leases	Belgium
Audit over a Rail Transport Institute	Portugal
Autonomous (regional) and local public sectors, financial year 1999. Item concerning "Public Procurement"	Spain



### For the need of clear definition and detailing of the awarding criteria and its weighting:

Report	SAI
Bus line services: cost price and contract award to operators	Belgium
2000 Annual Report (§ 4.127.6), 2001 Annual Report (§ 4.129.65), 2002 Annual Report (§ 4.136.7(a))	Cyprus
Finnish state's payment traffic procurement	Finland
Audit over a Rail Transport Institute	Portugal
Public Private Partnerships in Health Sector	"
Integrated Project of the Northern Railroad	"

### For relevancy of the award criteria towards the subject matter of the contract:

Report	SAI
Public Private Partnerships in Health Sector	Portugal
Integrated Project of the Northern Railroad	"

### For possible award sub-criteria (excluding candidates' suitability requisites):

Report	SAI
Integrated Project of the Northern Railroad	Portugal

### For clear requisites of technical competence of tenderers:

Report	SAI
Procurement management in the field of IT systems, software products and software services (2004)	Estonia
Building works of the high speed line Madrid-Barcelona-1999 and 2000	Spain







### 2. AUDITING THE PREPARATION OF THE PROCUREMENT

#### 2.5. Was the submission of variant tenders accepted and duly ruled?

##### Background

Where the criteria for award are that of the most economically advantageous tender, the public authority may allow the submission of variants. This might prove beneficial in case the authority is not absolutely certain about the detailed solution for the performance, especially if they want to benefit from innovation. In this case the tender may vary from the performance description without being excluded only for this reason. However, the public authority may evaluate any submitted variant only in cases where certain requirements are met.

##### Questions

- Did the public authority permit tenderers to submit variants, thus offering space for creative solutions and added value?
- In that case, was the award criteria that of the most economically advantageous tender?
- Was the admissibility of variants displayed in the contract notice?
- Did the public authority state the minimum requirements to be met by the variants in the tender documents?
- Did it also specify the requirements for the presentation of variant tenders?

##### Guidance

- Directive:

For detailed information about variants see article 24

## Checklists for financial and compliance audit

- **PPWG Procurement Performance Model (PPM):**

See nº 16 of PPM, about procedures open to innovation .

- **ECJ Case-Law**

Case	Judgement	Issue
C-421/01, Traunfellner	2003.10.16	Need of informing tenderers about the minimum specifications of variants



### 2. AUDITING THE PREPARATION OF THE PROCUREMENT

#### 2.6. Where applicable, did the public authority adequately manage experts employed to assist in the procurement process?

#### Background








In many cases where a specific knowledge or expertise is required, a public authority will engage experts to prepare technical specifications and/or tender documents. Experts may also need to be employed to meet particular requirements of the Directive.

Monitoring by the public authority is of particular importance in these cases. Care must be taken to ensure user requirements are defined and incorporated into contract performance. Care must also be exercised to ensure that the specifications defined do not give any advantage to economic operators who are in a position to influence the expert. Furthermore, it must be ensured that all the key documentation is given to the contracting authority, so that it effectively owns the process and is able to treat all candidates in like manner including the distribution of all requested information.

The involvement of experts in competitions introduces the danger of violating the basic principles of equal treatment/non-discrimination and transparency. Experts may be given the opportunity to design requirements in their own favour or, at least, may have access to privileged knowledge or other advantages capable of distorting the normal conditions of competition. Risks of corruption are also increased. Many national rules exclude experts employed on any part of the process from subsequently participating in the competition.

The European Court of Justice has recently ruled that a provision to automatically exclude experts from submitting a tender in a competition where he had an involvement is precluded by the Directives, stating that those experts must be given the opportunity to prove that, in the circumstances of the case, the experience acquired was not capable of distorting competition. In any case, if the public authority accepts the participation of an expert it had engaged, it must be able to demonstrate that the expert gained no advantage from the engagement.

### Questions

- Where the public authority engaged an expert, was the contract awarded in compliance with procurement regulations?
-  • Were the specifications of the contract determined free from influence of particular interests of consultants, experts or other economic operators?
-  • Has the public authority examined in detail the definition of performance?
-  • Is there no evidence that the expert has influenced the decisions taken by the public authority in his/her interest or in the interest of a specific contractor?
-  • Was all the key documentation given to the contracting authority?
-  • Was the expert likely to gain privileged knowledge from his activity which could be advantageous for him in a subsequent competition? If so, was his participation in the contract specifically excluded?
-  • If the expert was allowed to submit a tender, was all the relevant information the expert had gained from his earlier involvement made available to the other bidders?
-  • Is there no evidence that the consultants participating in the project design released information to contractors competing for the prime contract?

### Guidance

- ECJ Case-Law

Case	Judgement	Issue
C-21/03 and C-34/03, "Fabricom SA"	2005.03.03	Principle of non-discrimination between tenderers/ privileged knowledge



### 3 AUDITING THE PROCEDURE CHOSEN TO PROCURE

#### 3.1. Did the public authority decide for an appropriate and admissible procurement procedure?

#### Background


The selection of the procedure has consequences for the scope of competition.

Public authorities have the option to follow an open or a restricted procedure but must not conduct a negotiated procedure unless exceptional conditions expressly described prevail. This section of the Directive should be strictly interpreted and assumed only under exceptional circumstances (European Court of Justice).

The Directives introduce the possibility of using new types of procedures, like competitive dialogue, framework agreement and dynamic purchasing system, aimed at bringing some procedural flexibility and savings possibilities without comprising fair competition and transparency. Note: EU Member States may opt to allow, or not, these types of procedure in their countries.

In practice negotiated procedures are frequently used, the consequences of which are a restricted competition and negotiations about performance and prices which make it more difficult for the public authority to adhere to the principles of equal treatment and transparency. It is a major violation of EU procurement regulations and international standards for public authorities to award contracts without following the applicable procedures.

#### Questions

- Has the public authority taken a well-grounded decision about the procurement procedure chosen and has it documented the process?
- Is it clear which procurement procedure the public authority has opted for?
-  • Where Directive is not applicable, are there regulations or policies stating the procedures to be adopted for the procurement and were they complied with?

## Checklists for financial and compliance audit

- F/C** • Did the public authority opt for the procedure that offers fair and open competition under the given circumstances?
- F/C** • If exceptional negotiated procedures were used, did the contracting authority give sufficient and reasonable reasons for its option, providing a detailed explanation as to why an open or restricted procedure was not possible?
- F/C** • In this case, did it use one of the possible exemptions set in the Directive to justify the negotiated procedure and did it clearly and adequately set forth that the conditions of that exemption are met?
- F/C** • Did those conditions actually occur?
  - When competitive dialogue was used, did the contracting authority provide sufficient justification for the use of this procedure and was the contract actually “*particularly complex*”?
  - Was the chosen procedure the most efficient and effective for the performance of the contract?

### Guidance

- **Directive:**

For more details concerning procurement procedures see Articles 28 to 34, see description of circumstances that allow the use of exceptional negotiated procedures in articles 30 and 31.
- **Directive 2009/81/EC:**

Procurement rules for defence and security contracts.
- **PPWG Guideline for Auditors:**

See n° 11 (Tendering Procedures).
- **PPWG Procurement Performance Model (PPM):**

See n° 16 of the PPM, about planning the public procurement process, and n° 17 about compliance with EU law.



### • ECJ Case-Law

In the case-law of the European Court of Justice the codified exemptions are restrictively interpreted and assumed only under exceptional circumstances. This concerns especially those premises given under article 30 (1,c) and article 31 (1,b and c).

Case	Judgement	Issue
C-199/85, Commission/Italy	1987.03.10	Exceptional circumstances that enable direct award must be proved
C-3/88, Commission/Italy	1989.12.05	Use of restricted procedure without adequate justification
C-157/06, Commission/Italy	2009.10.02	"
C-24/91, Commission/Spain	1992.03.18	Use of restricted procedure without adequate justification: reasons of extreme urgency
C-107/92, Commission/Italy	1993.08.02	"
C-328/92, Commission/Spain	1994.05.03	"
C-318/94, Commission/Germany	1996.03.28	Use of restricted procedure without adequate justification: reasons of extreme urgency and unforeseeable event
C-231/03, Coname	2005.07.21	Direct award of a concession is not permissible without appropriate transparency
C-458/03, Parking Brixen	2005.10.13	Direct award of a public service concession is not admissible
C-107/98, Teckal	1999.11.18	In-house providing exception
C-26/03, Stadt Halle	2005.01.11	"
C-458/03, Parking Brixen	2005.10.13	"
C-295/05, Asemfo/ Tragsa	2007.04.19	"
C-324/07, Coditel	2008.11.13	"
C-573/07, Sea Srl/ Comune di Ponte Nossa	2009.09.10	"
C-196/08, Acoset SpA	2009.10.15	Possibility of awarding a public service to a semi-public company formed specifically for the purpose of providing that service, when the private participant in that company has been selected by means of a public and open procedure.
C-480/06	2009.06.09	Cooperation between local authorities
C-299/08, Commission/France	2009.12.10	Single procedure for the award of the contract

### • Audit reports and studies:

#### For advantages of framework agreements:

Report	SAI
Framework contracts: the Federal Central Buying Office's operation examined in terms of sound management and legality	Belgium
Follow-up framework agreements	"

## Checklists for financial and compliance audit

### For “stock contract technique”:

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels	Belgium

### For the use of undue and less competitive procedures:

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Contract marketing and promotion expenditure	“
Flemish Broadcasting Corporation (VTR)’s cooperation with external services for television programmes	“
Consultancy contracts awarded by ministerial cabinets	“
Dredging works	“
Statistics Finland’s service procurements	Finland
Universities’ procurement activities	“
Use of expert services by the Defence Administration	“
Audit over a Rail Transport Institute	Portugal
Public investment projects by public rail transport enterprise	“
Parliament’s 2005 account	“
High speed railway project	“
Integrated project of the Northern Railroad	“
Mafra Municipality and its enterprises	“
Sintra Municipal enterprise for parking management (including selection of private partner to a PPP arrangement)	“
Procurement awarded during the financial year 2002 by the state public sector	Spain
Autonomous (regional) and local public sectors, financial years 1999 and 2000. Itens concerning “Public Procurement”	“

### For non justification of used procedure:

Report	SAI
Procurement awarded by the state public sector during the financial years of 1999, 2000 and 2001	Spain

### For the use of restricted procedures:

Report	SAI
Restricted procedures (above and below thresholds)	Germany





### 3 AUDITING THE PROCEDURE CHOSEN TO PROCURE




#### 3.2. Did the chosen procedure ensure competition and transparency?

##### Background

Besides the attainment of value, the principles of fair competition, transparency and equal treatment must also be respected. European regulations establish different levels for safeguarding these principles according to the relevant size of the contracts and the need to balance the function and weight of formalities with the associated costs. In an open procedure, all interested economic operators are given the opportunity to submit a tender, which is not necessarily the case with other procedures. According to the procedures chosen, certain minimums have yet to be considered. Companies who did not apply must not be separately invited by the public authority for reasons of equal treatment.

##### Questions

→ When a restricted procedure was used:

-  • Did the public authority publish a prior notification calling any interested candidate to request participation?
- When the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
  - The minimum and maximum number of candidates it intends to invite?
  - The objective and non-discriminatory selection criteria to be used to choose that number of candidates?
-  • Did the number of candidates invited respect the minimum set (usually 5), ensuring a genuine competition?
-  • Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?

### → When a negotiated procedure with publication of a contract notice was used:

- F/C** • Were all interested operators allowed the opportunity to participate in the tender stage?
- Where the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
  - o The minimum and maximum number of candidates it intends to invite?
  - o The objective and non-discriminatory selection criteria to be used to choose that number of candidates?

- F/C** • Did the number of candidates invited respect the minimum set (usually 3), ensuring a genuine competition?

- F/C** • Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?

### → When a negotiated procedure without prior publication of a contract notice was used:

- F/C** • Was a sufficient competitive environment created?

### → When a competitive dialogue was used:

- F/C** • Were all interested operators allowed the opportunity to participate?
- When the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
  - o The minimum and maximum number of candidates it intends to invite?
  - o The objective and non-discriminatory selection criteria to be used to choose that number of candidates?

- F/C** • Did the number of candidates invited respect the minimum set (usually 3), ensuring a genuine competition?

- F/C** • Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?
- Was the award criterion only the most economical advantageous tender?



### → When a framework agreement was used:

- F/C** • Has the agreement been awarded in compliance with the general procurement regulations?
  - Have the special requirements pursuant to Article 32 of Directive been met?
  - Is the duration of the agreement less than the maximum term of four years?
- F/C** • When awarding a single contract, were the public authority and the supplier the original parties to the framework agreement? When not, was the competition reopened?

### → When a dynamic purchasing system was used:

- Was the dynamic purchasing system set up following the rules of open procedure?
- In the set up of the system and in the award of contracts were only electronic means used?
- F/C** • Were all economic operators given the opportunity of submitting indicative tenders and allowed admission throughout the entire period of the dynamic purchasing system?
  - Have the special requirements pursuant to Article 33 of Directive been met?
  - Was invitation to tender to each specific contract issued after the evaluation of the indicative tenders was completed?
- F/C** • Were all admitted tenderers invited to submit a tender for each specific contract?
  - Is the duration of the system less than four years?
  - Were no charges billed to interested economic operators or the parties to the system?

## Guidance

### • Directive:

For open procedure see article 1(11/a)

For restricted procedures see articles 1(11/b), 44(3) and Annex VIIA

For negotiated procedures see article 1(11/d), 2, 30, 31 and 44

For competitive dialogue see articles 1(11/c), 29 and 44

For framework agreements see articles 1(5) and 32

For dynamic purchasing system see articles 1(6), 33, 35(3,4), 42(2-5) and Annex VIIA

## Checklists for financial and compliance audit

- **PPWG Guideline for Auditors:**

See nº 11 and Appendix V, VI and VII

- **PPWG Procurement Performance Model (PPM):**

See nº 16 of the PPM (implementing the public procurement process) and nº 17 (compliance with EU law).

- **ECJ Case-Law**

Case	Judgement	Issue
C-225/98, Commission/France	2000.09.26	Limitation to a maximum of five tenderers within a restricted procedure is not admissible
C-20 and 28/01, Commission/Germany	2003.04.10	Possibility of a negotiated procedure without prior publication of a contract notice
C-385/02, Commission/Italy	2004.09.14	Strict interpretation and need of proof of derogations regarding the existence of exceptional circumstances
C-340/02, Commission/France	2004.10.14	Use of negotiated procedure without justification/ need of proof about the existence of exceptional circumstances
C-84/03, Commission/Spain	2005.01.13	Strict interpretation of derogations/ Unjustified use of negotiated procedure
C-138/08, Hochtief and Linde	2009.10.15	Negotiated procedures, obligation to ensure genuine competition, minimum number of suitable candidates

- **Audit reports and studies:**

**For lack of transparency and competition:**

Report	SAI
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium



### 4 AUDITING THE PUBLICITY AND NOTIFICATIONS USED

#### 4.1. Did the public authority notify procurement processes and results in compliance with the Directive and EC Treaty?

##### Background

Notifying the intention to award a contract and publishing the rules that govern the procedure is crucial for a fair and open competition.

Directives comprise a series of rules which cover the form of notification and time frame for the procedure. Although these rules may seem merely formal, they are generally binding and ensure conditions for fair competition, adequate time for preparation of tenders, equal treatment and transparency. Also, the European Court of Justice has considered that their violation has serious consequences for the legitimacy of the procedure.

The Directive discriminates between three different commitments to place notifications – prior information notice, call for tender and post award notification – of which the call for tender is the most crucial aspect.

##### Questions

- When the contracting authority shortened the time limits for the receipt of tenders, had it published a prior information notice about the intended awards in the Official Journal of European Union (OJEU)?



- When under the scope of the Directive, was the call for tenders for contracts or framework agreements published in the OJEU?
- Did this notice follow the necessary form, including disclosure of all the required information?
- Were national advertisements published after the day when the official notification was sent to OJEU?
- Did national advertisements confine details to those contained in the notification sent to OJEU?

- F/C** • Did time limits set to receive tenders and requests to participate comply with the minimum requirements established for the chosen procedure?
- F/C** • For contracts below the thresholds, was an advertisement to open the award to competition published?
- F/C** • In this case, were the means and content of advertising adequate having regard to the relevance of the contract to the Internal Market?
- F/C** • Was the time limit set for submission of bids sufficient to the potential bidders to prepare and submit their bids?
  - Were results of the award procedures published?

### Guidance

- **Directive:**

For prior information notice obligation see articles 35, 36, 38 and Annexes VIIA and VIII.

For forms and content of contract notices see articles 35, 36, Annexes VIIA and VIII. See also Annex II to Commission Directive 1564/2005, from 7 September 2005.

For minimum deadlines to receive tenders or requests to participate and shortening possibilities see articles 36(2) and 38.

For notices on award results see article 35(4).

- For notification of procurement in contracts not covered by the Directive, namely contracts below the thresholds, see [Commission Interpretative Communication 2006/C 179/02](#).

- **PPWG Guideline for Auditors:**

For prior and contract notices see n.º 5 and 7.

For time limits see nº 12.

For notices on award results see nº 18.



- **PPWG Procurement Performance Model (PPM):**

For the need for proper communication between procurement staff and suppliers see n° 16 of PPM.

For compliance with EU law see n° 17 of PPM.

- **ECJ Case-Law**

Case	Judgement	Issue
C-76/81, Transporoute	1982.02.10	The purpose of rules regarding participation and advertising is to protect tenderers against arbitrariness
C-225/98, Commission/France	2000.09.26	Situations where the publication of a prior information notice is compulsory
C-324/98, Teleaustria Verlag	2000.12.07	Principles of non-discrimination and transparency: need for advertising in a public service concession awarding procedure
C-399/98, Ordine degli Architetti	2001.07.12	Need for contract notices

- **Audit reports and studies:**

**For notices or information to the bidders:**

Report	SAI
Contract marketing and promoting expenditure	Belgium
Statistics Finland's service procurements	Finland
Contracts of assistance, consultancy and services awarded by the Foundation for Further Education- financial years 1996 to 1998	Spain
Contracting awarded under the establishment of new ways of management of the National Health Service- financial years 1999, 2000 and 2001	"







### 4 AUDITING THE PUBLICITY AND NOTIFICATIONS USED

#### 4.2. Was timely and equal access to contract documents and information provided to all candidates?

#### Background

The equal access to information by candidates is clearly and extensively protected by the European public procurement regulations and is a primary mechanism for guaranteeing fair competition and transparency and for reducing the scope of favouritism being given to specific interests.

The use of information and communication technologies has brought wider possibilities of accessing and spreading information, for taking advantage of organised knowledge and for accelerating procedures. Accessibility and security have new significance in this context.

#### Questions

- Did the contracting authority offer unrestricted and full electronic access to the contract documents and any supplementary documents (specifying the internet address in the notice)?

- F/C** • When that type of access was not offered, were all specifications, documents and additional information made available on a timely basis or issued in hard copy to economic operators?

- F/C** • Were the documents describing the requirements and performance accessible to all bidders in the same way or were specific documents easier to obtain for domestic bidders?

- F/C** • Was additional significant information supplied to all interested parties?

- F/C** • Were the means of communication and information exchange used free from barriers and did they allow economic operators' access to the tendering procedure?

- If an electronic auction or a dynamic purchasing system was used, did the tender documents specify details on access to information, electronic equipment used and connection specifications?

### Guidance

- **Directive:**

For electronic and non-electronic access to documents see articles 38(6), 38(7), 39(1,2), 40(1-4), 42 and Annex X.

For electronic auctions see article 54(3).

For dynamic purchasing systems see article 33.

- **PPWG Guideline for Auditors:**

See n° 13.

- **PPWG Procurement Performance Model (PPM):**

See n° 16 (implementing the public procurement process) and n° 17 (compliance with EU law).

- **ECJ Case-Law**

Case	Judgement	Issue
C-359/93, Commission/Netherlands	1995.01.24	Information to be included in tender notices

- **Audit reports and studies:**

**For the need of providing all the bidders with complete information about the contract performance:**

Report	SAI
The procurement and commercial use of multipurpose icebreakers	Finland



### 4 AUDITING THE PUBLICITY AND NOTIFICATIONS USED

#### 4.3. Was confidentiality ensured when necessary?

#### Background

Transparency should not undermine the importance of not giving any advantage to bidders when making their offers. Confidentiality in critical moments is essential to ensure that the public interest is protected and to preserve business confidence. Preventing access to privileged information is also a cornerstone to deter corrupt opportunities.

#### Questions

- F/C** • Did communication, exchange and storage of information ensure confidentiality of tenders and requests to participate?
- F/C** • Was the content of tenders and requests to participate only known after expiration of the time limit set for submitting them?
- F/C** • During an electronic auction, did the identity of tenderers remain undisclosed at all times?
  - In a competitive dialogue, were solutions proposed or confidential information given by a candidate not revealed to others without his/her express agreement?

#### Guidance

##### • Directive:

For confidentiality requirements see articles 29(3), 42(3) and 54(6).

##### • ECJ Case-Law

Case	Judgement	Issue
C-538/07, Assitur	2009.05.19	Companies linked by a relationship of control or significant influence as competing tenderers





### 5 AUDITING THE AWARD PROCEDURES

#### Background

The awarding procedures are typically conducted in five separate steps:

- Formal review of bids
- Assessment of the suitability of bidders
- Confirmation of exclusion causes for tenders
- Evaluation of tenders and award decision
- Conclusion of the contract

In some procedures, like restricted procedure, negotiated procedure with advertising, competitive dialogue and dynamic purchasing system, completely autonomous stages are devoted to the selection of the economic operators allowed to submit a tender. Those who, having requested that possibility, are not selected as suitable bidders are, from that moment, outside of the competition and are not required to prepare a tender.

For other procedures, such as the open one, the suitability of candidates is assessed after they have submitted their tenders. However, the qualitative assessment of candidates must be undertaken separately and performed prior to the evaluation of tenders, a practice that is sometimes overlooked by contracting authorities.

It follows that evaluation steps must be done in accordance with the framework of each specific procedure.





### 5. AUDITING THE AWARD PROCEDURES

#### 5.1. Was a formal review of tenders received undertaken?

#### Background

Before the assessment of bidders takes place there should be a formal verification about the compliance with basic requirements, such as adherence to deadlines and enclosure of the information requested.

#### Questions

- Is there a record maintained of the procedures followed in the opening of tenders together with the reasons for the acceptance or rejection of tenders received?

**F/C** • Were at least 2 officials employed to work together in the opening of the tender documents?

- Did the contracting authority verify compliance with the basic requirements of the competition?

**F/C** • Were tenders rejected for due cause such as:

- o Were not received within the prescribed time limit?
- o Were not submitted in a closed envelope?
- o Did not meet the formal requirements?
- o Did not include the required certifications and information?

**F/C** • Were no tenders presented after the time limit accepted?

#### Guidance

- Directive:

For formal review of tenders see articles 26 and 41(2).

- **PPWG Guideline for Auditors:**

For tender opening and formal review see n.º 14.

- **PPWG Procurement Performance Model (PPM):**

See n.º 16 of PPM (implementing the public procurement process).





### 5. AUDITING THE AWARD PROCEDURES

#### 5.2. Was the suitability of candidates accurately assessed?

##### Background

The contracting authority should admit only those bidders which demonstrate eligibility, including minimum capacity levels set in the procurement documents. As we have seen in 2.4, the public authority has some discretion concerning the requirements and verification it seeks, provided they are justified by the subject-matter of the contract and don't unnecessarily limit competition.

In addition, a public authority should ensure that contracts are not awarded to operators who have committed certain offences or participated in criminal organisations.

When assessing the suitability of bidders, the principles of equal treatment and transparency must also be observed.

The contracting authority must document the process followed in the selection of candidates, stating the reasons for selection and rejection.

##### Questions

- F/C** • Was the qualitative assessment of submissions received undertaken independent of and prior to the evaluation of tenders?
- F/C** • Are the processes followed documented, including the reasons for selection and rejection?
- F/C** • Did the contracting authority assess suitability of bidders exclusively on the basis of the requirements previously announced and in a non-discriminatory manner?
- F/C** • Did candidates prove their suitability to pursue the professional activity as admissibly required?
- F/C** • Did candidates give evidence of their technical and/or professional ability in accordance with the references specified in either the notice or invitation to tender?

## Checklists for financial and compliance audit

- F/C** • Did candidates give evidence of their economic and financial standing in accordance with the references specified in either the notice or invitation to tender or other appropriate documents?
- F/C** • Where the economic operator intends to rely on the capacities of other entities, did it prove their ability to access the necessary resources?
  - Where required, did candidates give evidence of complying with quality assurance standards?
  - Where required, did candidates give evidence of complying with required environmental management standards?
  - Where required, were candidates registered as approved contractors, suppliers or service providers or certified by relevant bodies?
- F/C** • Did the contracting authority request and verify evidence that candidates:
  - o (and/or their representatives) were not convicted of participation in a criminal organisation, corruption, fraud or money laundering?
  - o Were not bankrupt or in an analogous situation?
  - o Were not guilty of offences of professional conduct?
  - o Have fulfilled obligations related to the payment of social security contributions and taxes?
- F/C** • Is there no evidence of false certifications?
  - Were candidates from States covered by AGP Agreement included and evaluated in like manner to all other submissions received?



### Guidance

- **Directive:**

For suitability to pursue the professional activity see article 46.

For admissible means of proving technical and/or professional ability see article 48(1-6)

For admissible means of proving economic and financial standing see article 47(1-5)

For the use of capacities of other entities see articles 47(2,3), 48(3,4) and 52(1)

For admissible quality assurance assessment see article 49

For admissible environmental management assessment see article 50

For non-discriminatory provisions about lists or certifications see article 52

For exclusion causes see article 45

For AGP Agreement see article 5

For documentation and communication procedures see articles 41 and 43

- **Directive 2009/81/EC:**

In defence and security procurements candidates may be required to submit specific guarantees ensuring security of information and security of supply.

- **PPWG Guideline for Auditors:**

See n° 18

- **PPWG Procurement Performance Model (PPM):**

See n° 16 of PPM (implementing the public procurement process) and n° 17 (compliance with EU law).

## Checklists for financial and compliance audit

### • ECJ Case-Law

Case	Judgement	Issue
C-389/92, Ballast Nedam Groep I	1994.04.14	Considering the resources of companies belonging to a holding in assessing suitability of dominant legal person of the group
C-5/97, Ballast Nedam Groep I	1997.12.18	"
C-176/98, Holst Italia	1999.12.02	Service provider relying on the standing of another company as proof of its own standing
C-305/08, CoNISMa/ Regione Marche	2009.12.23	Entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market (such as universities and research institutes) are allowed to take part in public tendering procedures for the award of service contracts
C-199/07, Commission/ Greece	2009.11.12	Qualitative selection, criteria for automatic exclusion
C-376/08, Serrantoni and Consorcio stabile edili	2009.12.23	A permanent consortium and one of its member companies as competing tenderers

### • Audit reports and studies

#### For illegal admission of bidders:

Report	SAI
Audit over a Rail Transport Institute	Portugal



### 5. AUDITING THE AWARD PROCEDURES

5.3. Were the documents received scrutinised for completion and adherence to stated conditions before the tenders were evaluated?

#### Background

Once suitability has been established, the next step is to evaluate the tenders received. The public authority may first exclude tenders that cannot be accepted for reasons such as not meeting performance conditions or quoting too low a tender sum to enable the contract to be properly performed.

A very low priced tender cannot be rejected unless the bidder is first given the opportunity to explain the basis of his cost estimates.

#### Questions

- When performance conditions were detailed in the tender documentation, did the contracting authority verify if the tenders received met those requirements?

**F/C** • Did variants taken into consideration meet the requirements for their presentation?

**F/C** • Is there no evidence of a quotation priced too low?

**F/C** • In that case, did the contracting authority write to the bidder seeking disclosure of the basis of his cost estimate?

- Did the bidder comply with this request within the deadline set?

**F/C** • Were the reasons for the estimation verified and was it possible to clear doubts?

**F/C** • In open and restricted procedures, did the contracting authority make sure that there is no substantive change to the bid due to this clearing process?

**F/C** • When a tender was considered abnormally low because of state aid, is there no verifiable clue/indication that the aid was granted illegally?

**F/C** • When tenders were actually rejected because they were abnormally low, were reasons for this decision given and were they sufficiently grounded?

### Guidance

- **Directive:**

For performance conditions see articles 26 and 27

For subcontracting see article 25

For abnormally low tenders see article 55

For variants see article 24.

- **PPWG Guideline for Auditors:**

See nº 17

- **PPWG Procurement Performance Model (PPM):**

See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).

- **ECJ Case-Law**

Case	Judgement	Issue
C-76/81, Transporoute	1982.02.10	Obligations of the contracting authority regarding an abnormally low tender
C-103/88, Fratelli Costanzo	1989.06.22	Obligations of Member States when defining rules regarding abnormally low tenders
C-243/89, Commission/Denmark	1993.06.22	Principle of equal treatment: prohibition of negotiating with a tenderer on the basis of a tender not complying with the tender conditions
C-285 and 286/99, Lombardini and Mantovani	2001.11.27	Obligations of Member States and contracting authorities regarding abnormally low tenders



### 5. AUDITING THE AWARD PROCEDURES

#### 5.4. Were bids properly evaluated?

#### Background

The final evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. The public authority has to consider all the published criteria, pursuant to the indicated weighting. Admissible variants which meet the requirements must be evaluated in the same way as the other bids.

The award decision will be based on the result of the evaluation of tenders.

In open and restricted procedures, any dialogue with candidates that could be construed as “post tender negotiation” on price or other tender elements is not permissible. However, for other procedures, such as negotiated or competitive dialogue, negotiations are permissible within certain rules and may result in changes in the tenders. These negotiations may even take place through an electronic auction.

#### Questions

- F/C** • Is the evaluation process documented in a transparent, plausible and convincing manner?
- F/C** • Did the contracting authority evaluate only those tenders that qualified in the former 3 steps?
- F/C** • When open and restricted procedures were used, no negotiations or alterations to tenders were permitted, namely on price?
- F/C** • When negotiations or fine-tunings of the tenders did take place, were these permitted within the procedure followed?
- F/C** • In those cases, was equality of treatment and distribution of information provided to all tenderers during the dialogue or the negotiations?
  - When negotiation took place in successive stages, was this practice stated in the procurement documents and was it done in accordance with the award criteria stated?

## Checklists for financial and compliance audit

- Where an electronic auction was used to bid, were all required specifications given equally to tenderers?
- In this case, did the contracting authority make a full initial evaluation of the tenders according to the award criteria and the weighting set, did it invite all bidders simultaneously to submit new prices and/or new values and did it provide the necessary information to them to enable them to continue bidding?
- F/C** • Did the contracting authority evaluate and rank bids against all and only those criteria, and relative weighting, which it had published in the procurement documents?
- When awarding contracts under a framework agreement, did the contracting authority comply with the terms laid down in that agreement?
- F/C** • Was there a sound basis for the scorings applied to the criteria and was the scoring well balanced?
- Were calculations used in evaluation adequate and correct?
- F/C** • Is there no evidence of collusion between bidders? <sup>6</sup>
- F/C** • Is there no evidence of unauthorized release of information or seemingly unnecessary contacts with bidders' personnel during the evaluation and negotiation processes?
- F/C** • Is there no evidence of favouritism towards a particular contractor during the evaluation and negotiation processes?
- F/C** • Is there no evidence of any individual on the evaluation panel being biased?
- F/C** • Is there no evidence of any external or superior pressure to reach a specific result?
- Did the contracting authority draw up a report in writing of the outcome of the evaluation in accordance with article 43 of the Directive?

5 Collusive bidding involves agreements or informal arrangements among competitors, limiting competition and usually concerning price fixing.

Situations and practices that may evidence collusion include: withdrawal of bids with no evident reason, fewer competitors than normal submitting bids, certain competitors always or never bidding against each other, bidders appearing as subcontractors to other bidders, patterns of low bids suggesting rotation among bidders, differences in prices proposed by a company in different bids with no logical cost differences, large number of identical bid amounts on line items among bidders, mainly when they are service-related, identical handwritings, company paper, telephone numbers or calculation or spelling errors in two or more competitive bids, submission by one firm of bids for other firms, reference to any type of price agreements, statements by contractors about any kind of market divisions or turns to receive jobs.

Collusive practices are usually very secret and, although indicators such as those mentioned are usually not sufficient to prove the anti-competitive activity, they are enough to alert appropriate authorities for investigation.





### Guidance

- **Directive:**

Article 53 is the central provision for the evaluation of tenders

For electronic auctions see article 54

- **PPWG Guideline for Auditors:**

See no. 16 and Appendix to Section 4

For electronic auctions see Appendix VIII

- **PPWG Procurement Performance Model (PPM):**

See n° 16 of PPM (implementing the public procurement process) and n° 17 (compliance with EU law).

- **ECJ Case-Law**

Case	Judgement	Issue
C-87/94, Commission/Belgium	1996.04.25	Taking into account amendments submitted after the opening of tenders, awarding a contract not complying with the contract documents or consider cost-saving features not referred in the contract documents offend principles of equal treatment and transparency
C-19/00, SIAC Construction	2001.10.18	Equal treatment of tenderers during the contracting procedure
C-331/04, ATI EAC and others	2005.11.24	Conditions allowing a jury to attach a specific weight to the subheadings of an award criterion

- **Audit reports and studies:**

**For formalization of consolidated tenders in negotiated procedures:**

Report	SAI
The North Wastewater Treatment Plant in Brussels. Award and funding of the concession contract	Belgium

## Checklists for financial and compliance audit

### For the need of a document comparing the bids and stating the grounds of the award:

Report	SAI
Statistics Finland's service procurements	Finland
Audit over a Rail Transport Institute	Portugal

### For a fair and transparent evaluation of bids, according to the award criteria:

Report	SAI
Bus line services: cost price and contract award to operators	Belgium
2000 Annual Report (§ 4.127.6), 2001 Annual Report (§4.129.65) and 2002 Annual Report (§ 4.136.7(a))	Cyprus
Ex-ante audit and also on the request of the Public Accounts Committee of the House of Representatives	"
State Budget funds provided for investment to the industrial zones	Czech Republic
Annual Report 2004 on federal financial management, Part II, items 3, 17, 18 and 42	Germany
Autonomous (regional) and local public sectors, financial year 1997. Item concerning "Public procurement".	Spain

### For awarding a contract not complying with the contract documents:

Report	SAI
Public investment projects by a public rail transport enterprise	Portugal
Public investment projects by the National Laboratory for Civil Engineering	"

### For collusion among bidders:

Report	SAI
Rental of aircrafts to fight forest fires	Portugal



### 5. AUDITING THE AWARD PROCEDURES

#### 5.5. Was the outcome of the award process properly reached and communicated?

#### Background

Having concluded the procurement process and award decision, the contracting authority has obligations of reporting and notification. These obligations reflect public accountability, transparency, control and the rights of candidates.

#### Questions

- F/C** • Was the award decision based on the result of the evaluation of tenders?
- F/C** • Has the award included no items different from those contained in bid specifications?
- F/C** • Did the chosen bid meet user needs?
- F/C** • Did the contracting authority draw up a comprehensive written report about progress and outcome of the procurement process?
  - Was that report communicated to the European Commission, when requested?
- F/C** • Were tenderers notified in writing and on a timely basis of decisions concerning the rejection of tenders or applications, the conclusion of the procurement procedure, the name of tenderer(s) selected and characteristics and relative advantages of the chosen tender(s)?
  - In case of decisions not to conclude a procurement or award a contract, were tenderers informed in writing and on a timely basis of those decisions and their grounds?
  - If information was withheld, was there reasonable justification for this decision?
  - Was there a reasonable interval between dates of award and contract to allow unsuccessful tenderers to seek a review of award decision?
- F/C** • Did the conditions of contract comply with the detail provided in the procurement documents and with the outcome of the procurement procedure followed?
- F/C** • Did the conditions included in the contract protect the risk of non-performance by the supplier and were there no conflicting provisions?
- F/C** • Were there no material changes in the contract shortly after award?

### Guidance

- **Directive:**

Article 43 outlines the content of the report on the tendering and evaluation process.

For information to tenderers and reasons to withhold it see article 41.

- **PPWG Guideline for Auditors:**

See n° 18

- **PPWG Procurement Performance Model (PPM):**

See n° 16 of PPM (implementing the public procurement process) and n° 17 (compliance with EU law).

- **ECJ Case-Law**

Case	Judgement	Issue
C-87/94, Commission/Belgium	1996.04.25	Taking into account amendments submitted after the opening of tenders, awarding a contract not complying with the contract documents or consider cost-saving features not referred in the contract documents offend principles of equal treatment and transparency
C-27/98, Fracasso and Leitschutz	1999.09.16	Contracting authorities are not obliged to award the contract to the sole tenderer considered as suitable
C-455/08, Commission/Ireland	2009.12.23	Guarantee of effective review. Minimum period to be ensured between notification to the unsuccessful tenderers of the decision to award a contract and the signature of the contract concerned.
C-337/98, Commission/France	2000.10.05	A substantial change in the scope of the contract or in the scope of the competition behind it is to be considered as a new award and a new contract for the purpose of Directives
C-496/99, Commission/CAS Suchi di Frutta	2004.04.29	
C-454/06, Priesstext	2008.06.19	



•Audit reports and studies:

**For post awarding changes in the contract:**

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels	Belgium
Introduction of double entry accounting at the Ministry of the Flemish Community	"
Building works of the high speed line Madrid-Barcelona- 1999 and 2000	Spain
Reports mentioned in 6.1	

**For the need of formal consolidate tenders after negotiations:**

Report	SAI
Wastewater treatment plant in northern Brussels- Award and funding of the concession contract	Belgium

**For the need of written contracts:**

Report	SAI
Contracts of assistance, consultancy and services awarded by the Foundation for Further Education, financial years 1996 to 1998	Spain





### 6. AUDITING ADDITIONAL WORKS OR DELIVERIES

#### 6.1. Were any additional works or deliveries admissible without the need for a new procurement procedure?

#### Background

Public authorities often choose to complement the works or deliveries procured and contracted, during their execution and without a new procurement procedure.







These changes in the content of the awarded performance may result from several circumstances:

- Unexpected technical reasons, as geological surprises or new legal requirements
- Suggestions for replacement of technical solutions or materials
- Changed ideas about the defined needs and possible improvements, as changing a basement into a parking area
- Adding needs to the ones described, as including a garden to a building, making a road longer than planned or buying more computers than the quantity tendered for.

Flexibility to change performance without the need to disrupt and going through a new procurement procedure might be necessary to fulfil needs and achieve savings. On the other hand it might also be a means of disrespecting the rules, favouring or rewarding a supplier, avoiding an open procurement or overcoming budgetary constraints.

Additions to contract should only be admissible in exceptional cases.

### Questions

-  • Did the additional works introduce minor or non-substantial changes to performance, as described in the contract documents?
-  • Were additional works brought about by a cause which had not previously existed?
-  • Were additional works strictly necessary for the completion of performance under the contract?
-  • Is it that additional works could not be technically or economically separated from the original contract without major inconvenience?
  - Did additional works amount to no more than 50% of the initial contract?
  - Were additional works charged at the unit prices agreed in the initial contract?
-  • Were additional deliveries a partial replacement for normal supplies or installations or an extension of existing supplies or installations?
-  • Would a change of supplier oblige the contracting authority to acquire material having different technical characteristics resulting in incompatibility or disproportionate technical difficulties in operation and maintenance?
  - Was the length of original and recurrent contracts less than 3 years?

### Guidance

- Directive:

For additional works see Article 31 (4/A) and for additional deliveries see Article 31 (2/b) rocess.



## Checklists for financial and compliance audit



### • ECJ Case-Law

Case	Judgement	Issue
C-337/98, Commission/France	2000.10.05	A substantial change in the scope of the contract or in the scope of the competition behind it is to be considered as a new award and a new contract for the purpose of Directives
C-496/99, Commission/CAS Suchi di Frutta	2004.04.29	
C-454/06, Presstext	2008.06.19	

### • Audit reports and studies:

#### For jeopardizing competition through delivering additional works:

Report	SAI
Final payment on some large-scale public works contracts	Belgium

#### For reasons leading to the delivery of additional works:

Report	SAI
Special Report No 8/2003 concerning the execution of infrastructure work financed by the EDF (OJEU, C181, 31Jul2003)	ECA
Expo 98	Portugal
Euro 2004	"
Large public works financial slippage	"
Additional public works contracts from 2006 to 2008	"

#### For undue delivery of additional works:

Report	SAI
Dredging works	Belgium
Port Maritime Institute	Portugal
Rail Transport Institute	"
Additional public works contracts from 2006 to 2008	"
Autonomous (regional) and local public sectors, financial years 1999 and 2000. Itens concerning "Public Procurement"	Spain

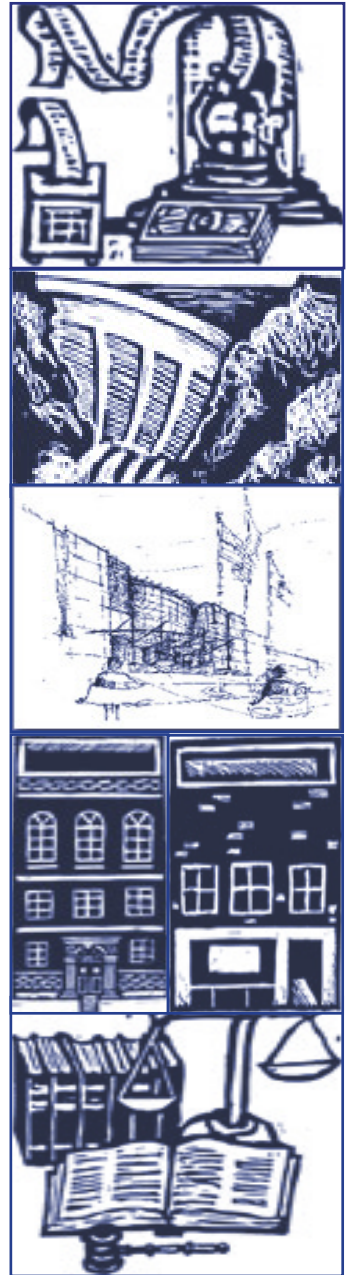
#### For deviations to the price of the initial contract:

Report	SAI
Construction of the "Deurganckdock" (Antwerp Container Terminal Complex)	Belgium
Rail Transport Institute	Portugal
Public-owned company	"
Large public works financial slippage	"
Additional public works contracts from 2006 to 2008	"
Ministry of Defence: major Projects report 2004	UK

## Checklists for financial and compliance audit

### For extension of contracts' time limits:

Report	SAI
Contracts awarded in 1999 and 2000 on the activities and services susceptible of generating revenues in a sample of public hospitals of the National Health System, with special reference to the contracts that have the realization of clinical tests as an object	Spain
Building works of the high-speed line Madrid-Barcelona-years 1999 and 2000	"



## Summaries of SAIs Audit Reports







## SUPREME AUDIT INSTITUTIONS SUMMARIES OF PROCUREMENT STUDIES<sup>1</sup>

### Court of Audit, Belgium

Report	Main issues
1. Bus line services: cost price and contract award to operators	Subcontracting process – Competition rules – Criteria Weighting – Amalgamation of market players – Cost price
2. Contract marketing and promotion expenditure	Legality – European publication of a notice – Advertising campaigns – Internal control
3. Framework contracts: The Federal Central Buying Office's operation (abbreviated in FOR/CMS) examined in terms of sound management and legality	Legality - Framework contracts
4. Execution of economic compensations associated with the purchase of specific military equipment	Economic compensations – Military programme contracts – Legality – Internal Control
5. Control of Public Contracts covering the Road Transport Infrastructure in Brussels	The "stock" contract technique – Implementation of the contracts
6. Construction of the «Deurganckdock» (Antwerp container terminal complex)	Public works – Cost increase – Damage claims
7. Damage compensations charged on the budget of the Flemish infrastructure fund	Damage claims – Damage compensations
8. Introduction of double entry accounting at the Ministry of the Flemish Community	Unclear project requirements – Negotiation procedure – Tight budget – Tight time planning – System flaws

<sup>1</sup> The full text of this Appendix is in the attached CD. There you can find a more comprehensive description of the mentioned SAI reports.

9. The Outsourcing of the Data processing function at the Ministry of the Flemish Community	Legality – Outsourcing contract – Vaguely termed contract
10. The North Wastewater Treatment Plant in Brussels. Award and funding of the concession contract	Contract award – Contract funding
11. Roads, motorways and waterways maintenance leases	General terms of procurement – Implementation of leases – Renewal of leases
12. Final payment on some large-scale public works contracts	Changes to the initial project
13. The “Ilot Ecluse” building construction works (public works contract)	Legality – Qualitative selection – Publication rules
14. Complying with public procurement regulation	Legality – Execution of public works – Qualitative selection – Service contracts – Renewal contracts
15. Public service contracts providing mainly intellectual services	Intellectual services procurements

### Audit Office, Republic of Cyprus

Report	Main issues
16. Provision of Consultancy Services for the Sewerage Conveyance and Treatment of the Greater Nicosia Area	Ex-ante audit and later – Consultancy Services – Technical evaluation criteria – Method of tender pricing
17. Provision of Services	Ex-ante audit – Provision of Services - Selection of advertising firm – Award of tender
18. IT procurement	Value for money - IT procurement



### Supreme Audit Office, Czech Republic

Report	Main issues
19. Funds spent on acquiring of the Czech Statistical Office headquarters	Regularity – Performance – Special category of purchase – Preparatory phase of the investment project – Urgent need – Form of public tender – Price and Funding – The building phase
20. State Budget funds provided for investment to the industrial zones	Performance – Assessment of the declared benefits of the programme – Implementation of the programme
21. State Budget funds and the management of the state property under the authority of the Ministry of Transport	Performance – Regularity - Management of the state property – Selected expenditures

### National Audit Office, Denmark

Report	Main issues
22. Untitled	Value for Money – Consultancy service

### State Audit Office, Estonia

Report	Main issues
23. Organisation of public procurement related to road repair (2004)	Performance – Procurement of road repair works
24. Management of public procurement at the Ministry of Interior and its governing area (2002)	Legality – Management of public procurement

25. Management of procurement at the Ministry of the Environment (2002)	Procurement of environmental services – Risk management
26. Procurement of maintenance services (2005)	Legality – Procurement of maintenance services
27. Procurement management in the field of IT systems, software products and software services (2004)	Legality - Management of procurements

### European Court of Auditors

Report	Main issues
28. Special Report No 8/2003 – execution of infrastructure work financed by the EDF (OJEC – C 181 – Volume 46 31 July 2003)	Infrastructure work – European Development Fund – Performance of infrastructure work – Compliance
29. Annual Report concerning the financial year 2000 (OJEC page 318-328, 15-12-2001)	Internal control – Procurement procedures – Compliance

### State Audit Office, Finland

Report	Main issues
30. Statistics Finland's service procurements	Performance – Compliance – Transparency – Non-discrimination
31. The Defence administration's procurement activities – Supply procurement	Performance – Defence



## Summary of the audit reports



32. The Finnish state's payment traffic procurement	Performance – Compliance – Principle of equality and non-discrimination – Principle of transparency
33. The procurement and commercial use of multipurpose icebreakers	Performance – Preparation of the procurement - Principle of equality
34. The procurement of public transport services	Performance – Management of the procurement – Preparation of the procurement
35. Universities procurement activities	Performance – Compliance – Preparation of the Procurement
36. Use of expert services by the defence administration	Performance – Preparation of the procurement – Implementation of the procurement
37. Procurements of system work and ADP consulting services by the tax administration	Performance – Compliance - Preparation of the procurement

### Bundesrechnungshof, Germany

Report	Main issues
38. Annual Report 2004 on federal financial management	Performance and regularity - Cross-boundary examinations – Preparation of the procurement – Award procedures

### State Audit Office, Hungary

Report	Main issues
39. Operation of the Hungarian Defense Forces Public Procurement System projects	Performance – Public procurement management
40. Summaries of the reports on the activity of the State Audit Office in 2002-2004	Annual reports

### Office of the Comptroller and Auditor General, Ireland

Report	Main issues
41. Development of an ICT Human Resource Management System	Value for Money – Management of the procurement
42. Primary Routes Improvement Programme	Value for Money – Implementation of the procurement – Cost increase
43. Waste Management in Hospitals	Value for Money - Environmental standards
44. Purchasing of Tyres by An Garda Síochána (Police Force)	Value for Money – Management of the procurement – Preparation of the procurement – Procurement procedures
45. Interview Recording Systems	Value for Money – Preparation of the procurement – Procurement procedures – Award procedures

### Tribunal de Contas, Portugal

Report	Main issues
46. Execution of a construction job to improve a local road	Compliance – Implementation of the procurement
47. Port-Maritime Institute	Compliance – Award procedures
48. Rail Transport Institute	Compliance – Award procedures
49. Euro 2004, 1st stage	Performance – Preparation of the procurement – Implementation of the procurement
50. EXPO'98	Performance – Management of the procurement – Implementation of the procurement
51. Centralised Public Tenders in the Health sector	Performance – Centralisation of public purchases
52. Public-owned company	Performance – Activities of a public-owned company – Preparation of the procurement – Implementation of the procurement – Additional works



### Audit Office, Slovak Republic

Report	Main issues
53. Report on the results of the check of compliance with the act on public procurement by Slovenská pošta, š. p. Banská Bystrica	Compliance – Principles of competition and economy – Procedures chosen to procure

### Tribunal de Cuentas, Spain

Report	Main issues
54. Autonomous (Regional) and Local public sectors, financial year 1996	Compliance – Implementation of the procurement
55. Contracts of assistance, consultancy and services awarded by the Foundation for Further Education, financial years 1996 to 1998	Compliance – Effectiveness – Private non-profit foundation
56. Contracting awarded by foundations, on establishment of new ways of management of the National Health Service. Financial years 1999, 2000 and 2001	Regularity and performance – Management of the procurement – Preparation of the procurement – Principles of publicity, concurrence, objectivity and transparency
57. Audit Report of the procurement awarded by foundations of the State public sector. Financial years 1999, 2000, 2001 and 2002	Regularity and compliance – Efficiency – Management of the procurement – Award procedures
58. Autonomous (Regional) and Local public sectors, financial year 1997	Preparation of the procurement – Implementation of the procurement
59. Acquisitions of medications and pharmaceutical products - 1999 and 2000	Compliance – Efficiency and economy – Management of the procurement – Preparation of the procurement – Procedure chosen to procure

60. Contracts awarded in 1999 and 2000 by hospitals of the National Health System, with special reference to contracts referring to the realization of clinical tests	Regularity – Regime of economic compensations – Preparation of the procurement
61. Procurement awarded during 2002 by entities of the State public sector	Compliance – Efficiency and economy – Procedure chosen to procure – Award procedures
62. Autonomous (Regional) and Local public sectors, financial year 1998	Compliance – Annual Report – Preparation of the procurement – Award procedures – Implementation of the procurement
63. Autonomous (regional) and Local public sectors, financial year 1999	Preparation of the procurement – Award procedures – Implementation of the procurement
64. Procurement subscribed by the State public sector during the financial years 1999, 2000 and 2001	“
65. Procurement awarded by the Provincial Delegations, financial year 2002, services of Home Assistance	“
66. Highspeed line Madrid-Barcelona – 1999 and 2000	“
67. File, storage, safekeeping or management of medical histories in hospitals: procurement on this activity	Management of the procurement – Preparation of the procurement – Implementation of the procurement
68. Autonomous (regional) and local public sectors. Financial year 2000	“



### National Audit Office, United Kingdom

Report	Main issues
69. Non-Competitive Procurement in the Ministry of Defence	Value for money - Defence equipment procurement - Non-competitive procurements
70. Improving IT Procurement – Progress by the Office of Government Commerce in improving departments’ capability to procure cost - effectively	Value for money - Department’s Procurement - Management of the procurement
71. Ministry of Defence: Major Projects Report 2004	Value for money - Defence equipment procurement – Project performance
72. Improving Public Services through better construction	Value for money - Construction projects
73. Purchasing and Managing Software licences	Value for money - Management of the procurement
74. Procurement of Vaccines by the Department of Health	Value for money - Management of the procurement
75. Modernising Procurement in the Prison Service	Value for money - Management of the procurement
76. Ministry of Defence: The Rapid Procurement of Capability to Support Operations	Value for money - Defence procurement - Management of the procurement
77. Improving IT Procurement: the impact of the Office of Government Commerce’s initiatives on departments and suppliers in the delivery of Major IT-enabled projects	Value for money - Management of the procurement

The image shows a horizontal banner with a blue background and yellow stars, representing the European Union flag. The text is positioned on the left side of the banner.

**The Contact Committee  
of the Supreme Audit Institutions of the European Union**